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Carl M. Gray Professor of Law
Jeffrey W. Grove

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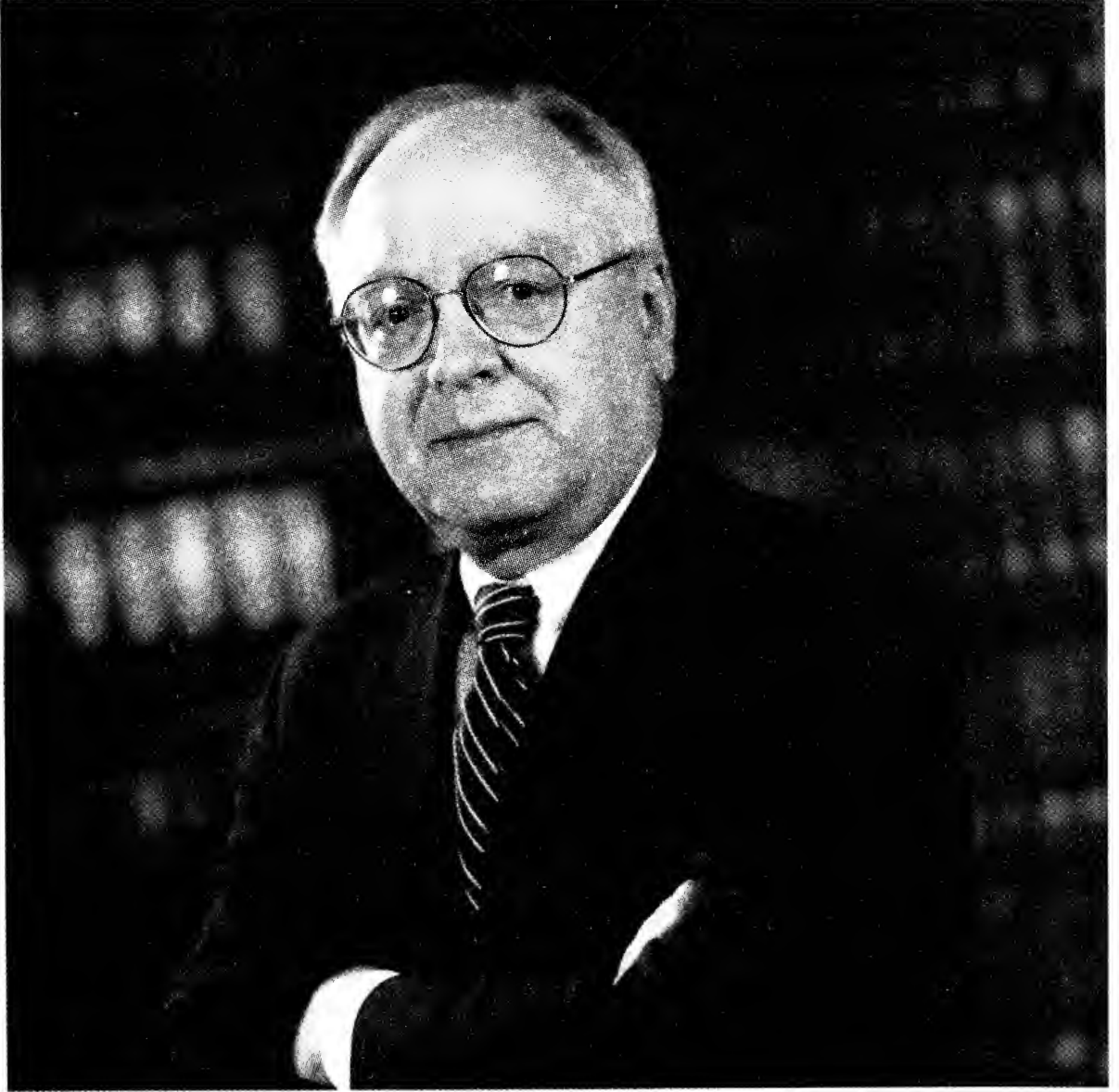
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JAMES W. TORKE

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TRIBUTE

TRIBUTE TO JAMES W. TORKE CARL M. GRAY PROFESSOR OF LAW

JEFFREY W. GROVE*

When Jim Torke arrived at the law school in August 1971, he set up shop in the school's new law building, dedicated the previous year. Nearly thirty years later he delivered one of the last public lectures presented in that building.¹ Soon afterwards the law school moved to its present home in Inlow Hall. Jim's lecture in March 2001, commemorating his investiture as the Carl M. Gray Professor of Law, was titled "What is This Thing Called the Rule of Law?"²

Jim's treatment of this question reflected ideas and beliefs that have guided and defined his work over the course of his career. "The rule of law," he said, "sets bounds to its discourse. Insofar as the rule of law is itself a rule, it is a rule of inclusion and exclusion of reasons, a rule of pedigree."³ This vision of law as "process, a practice of reason-giving, a set of argumentative conventions,"⁴ is what Jim has taught his students: effective lawyers "operate sure-footedly within the understood conventions," and we expect our judges to resolve disputes "by drawing on *legal* reasons, and not other reasons . . . or free-standing social, political, or moral purposes."⁵ What distinguishes law from other disciplines or systems, such as "politics, science, and philosophy," is the "boundedness" of law.⁶

This concept of law as a disciplined process, operating within received traditions and constraints, has informed Jim's scholarship.⁷ Analyzing and

* Professor of Law, Associate Dean for Graduate Studies, Director of the China Law Summer Program, Indiana University School of Law—Indianapolis.

I thank Bradley J. Bingham, J.D. Class of 2005, for gathering the statistical information, drawn from American Bar Association (ABA), Association of American Law Schools (AALS), and other sources, which appears *infra* at notes 14-26.

1. The "old" law building underwent a complete structural renovation and now houses the John Herron School of Art and Design.

2. Professor Torke's Carl M. Gray Lecture subsequently was published. James W. Torke, *What Is This Thing Called the Rule of Law?*, 34 IND. L. REV. 1445 (2001) [hereinafter Torke, *Rule of Law*].

3. *Id.* at 1450.

4. *Id.*

5. *Id.* (emphasis in original).

6. *Id.*

7. See *infra* notes 26-44 and accompanying text.

critiquing legal doctrine; exposing and evaluating its underlying policies; identifying doctrinal dissonance while seeking coherence; managing ambiguity within the determinacy of law; and bringing creative insights and fresh ideas to the enterprise—all of this distinguishes many of his contributions to legal literature. Much of his work affirms the value—indeed, the centrality—of traditional legal scholarship, even as inter-disciplinary and empirical methodologies have taken their place on academic research agendas. He has tried to bridge “a widening divide . . . between law scholarship and law practice.”⁸

In his Carl M. Gray Lecture, Jim also spoke about the pathology that can afflict the rule of law. He acknowledged the hazard of having “too much of a good thing,” quoting Grant Gilmore’s wonderful caveat: “‘In Hell there will be nothing *but* law, and due process will be meticulously observed.’”⁹ “Do we have too much law?” he asked. “At times . . . I feel claustrophobic amidst its ever-growing baggage and clutter . . .”¹⁰ He cautioned against the rule of law sliding “into the vice of legalism, a kind of *reductio ad absurdum* of the constitutional maxim that for every wrong there must be a remedy.”¹¹

He also identified a paradox: “[W]e must, in a sense, turn [Chief Justice] Marshall’s dictum on its head: A government of laws cannot exist without good people.”¹² Of course, “good people” include worthy lawyers whose work guards and propels the rule of law.

The rule of law is real, but . . . [i]ts preservation depends upon recognition of its limits, and even more importantly, upon an appreciation of how it works, and the existence of practical skills to keep it working. To maintain the rule of law and to provide good-faith lawyers upon which the rule of law stands, we must both enlighten and train.¹³

In his own words, we see intimations of Jim at work in his world—a good man in conscientious service to the profession he chose and the society in which he lives.

Jim’s Carl M. Gray Lecture eloquently portrayed some of the key ideas and convictions that have animated his career in the legal academy. A fuller understanding of his character and cast of mind can best be apprehended, however, within the wider context of his extensive record of scholarship, teaching, and collegial relationships, which I will consider in more detail anon.

First, however, reflecting on the span of Jim’s career, I offer some observations about the state of American legal education when the “Torke Era” began, and now, with Jim’s retirement, as it comes to a close. When Jim Torke

8. Torke, *Rule of Law*, *supra* note 2, at 1455.

9. *Id.* at 1451 (citation omitted).

10. *Id.*

11. *Id.* at 1452.

12. *Id.* at 1454.

13. *Id.* at 1456.

launched his career as assistant professor of law at Indiana University-Indianapolis thirty-four years ago, he was one of approximately 3100 full-time academic lawyers at American Bar Association (ABA) accredited law schools in the United States.¹⁴ Since then the size of the U.S. legal professoriate has nearly quadrupled: in 2003-04, approximately 12,000 legal academics held full-time appointments at ABA accredited law schools.¹⁵ Part of this growth is the result of changes in educational missions and instructional methodologies. For example, the number of full-time faculty who work in clinical legal education, or skills training, has grown from approximately 200¹⁶ to over 1250.¹⁷ Full-time instructors of legal writing now number more than 1700.¹⁸ In 1972-73 only about 450 full-time faculty taught legal research and writing courses (and not all on a full-time basis).¹⁹

During the course of Jim's estimable career, the face of American legal education has changed in other important ways. The number of ABA accredited law schools has increased from 147 to 191.²⁰ In 2004-05, 148,000 law students

14. See SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS'N, *LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS IN THE UNITED STATES* 5-27 (1971) (full-time faculty includes deans, librarians with academic rank, and associate dean and assistant deans who also teach).

15. See LAW SCH. ADMISSIONS COUNCIL & AM. BAR ASS'N, *ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS: 2005 EDITION* 828 (Wendy Margolis et al. eds., 2004) (listing a total of 12,216 for the 2003-04 academic year, including full-time faculty as well as deans, administrators, and librarians who also teach, but excluding part-time faculty) [hereinafter 2005 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS].

16. See COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY, *SURVEY OF CLINICAL AND OTHER EXTRA-CLASSROOM EXPERIENCES IN LAW SCHOOLS: 1970-71*, at viii (1971) (data from 1970-71 academic year; only 100 of approximately 146 ABA-accredited schools responded). In a similar survey of American law schools conducted for the 1972-73 academic year, there were 344 clinical faculty members identified. COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY, *SURVEY OF CLINICAL LEGAL EDUCATION: 1972-73*, at ix (1973) (117 of 151 ABA-accredited law schools responding to survey).

17. See ASS'N OF AM. LAW SCH., *THE AALS DIRECTORY OF LAW TEACHERS: 2004-05*, at 1144-53 (2004) (listing a total of 1254 who have taught any law subject by the "Clinical Method" or directed a Legal Clinic for a period of at least one full term; based on information submitted to AALS from law school deans and faculty).

18. *Id.* at 1285-97 (listing 1728 law teachers who identified themselves as teaching "legal research and writing," including legal bibliography).

19. ASS'N OF AM. LAW SCH., *DIRECTORY OF LAW TEACHERS: 1972*, at 756-59 (1972) (listing 457 faculty members who intended to teach "legal writing and research" courses during upcoming 1972-73 academic year).

20. Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, *Legal Education and Bar Admissions Statistics, 1963-2005*, at http://www.abanet.org/legaled/statistics/le_bastats.html (last visited Apr. 20, 2005) [hereinafter ABA, *Legal Education and Bar Admission Statistics, 1963-2005*]; Section of Legal Educ. & Admission to the Bar, Am. Bar Ass'n, *ABA-Approved Law Schools*, at <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited Apr. 20, 2005) (190 confer the J.D. degree; the other ABA approved school is the U.S. Army Judge

were enrolled, compared with 94,000 in 1971.²¹ Graduate law programs and joint degree programs have proliferated, and summer abroad law programs, largely unknown in the early 1970s, now total nearly 200.²² As law schools have sought greater integration with the universities of which most are a part, faculty scholarship has burgeoned, with increased emphasis on interdisciplinary research and empirical methodologies. To accommodate this outpouring of scholarship (as well as to enhance institutional prestige) the number of student edited and peer reviewed legal journals has increased from about 250 to 680.²³

And, of course, the face of legal education in the United States literally *looks* different now than it did when Jim Torke's academic career began with the decade of the 1970s. Then, women comprised 9.4%, and racial minorities 6.1%, of students enrolled in the nation's law schools.²⁴ Today women and racial minorities account for 48%, and 21%, respectively, of the law student population in American law schools.²⁵ In the early 1970s, few women and racial minorities

Advocate General's School, which offers an officer's resident graduate course, a specialized program beyond the first degree in law).

21. Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, *2004 Enrollment Statistics* (Jan. 12, 2005), at <http://www.abanet.org/legaled/statistics/fall2004enrollment.pdf> (listing total law school enrollment of 148,169 as of the fall of 2004 at 188 ABA-accredited schools) [hereinafter ABA, *2004 Enrollment Statistics*]; ABA, *Legal Educ. and Bar Admissions Statistics, 1963-2005*, *supra* note 20. The total number of enrollment for both time periods includes students enrolled in post-J.D. and other programs.

22. There are currently 196 different ABA-approved foreign summer law programs offered through 103 different ABA-accredited law schools. Section of Legal Educ. & Admission to the Bar, Am. Bar Ass'n, *Annual Foreign Summer Programs*, at <http://www.abanet.org/legaled/studyabroad/foreign.html> (last visited Apr. 20, 2005).

23. INDEX TO LEGAL PERIODICALS: SEPTEMBER 1970 TO AUGUST 1973, at xiii-xxi (Grace W. Meyer ed., 1974) (listing a total of 362 legal periodicals for this time period that "regularly publish legal content of high quality and permanent reference value"; excluding bar journals, bar section newsletters, annual surveys, "institutes" and reporters, there were approximately 249 legal periodicals in publication from 1970 to 1973); 2005 DIRECTORY OF LAW REVIEWS 71-78 (Michael H. Hoffheimer ed., 2004) available at <http://www.lexisnexis.com/lawschool/prodev/lawreview/default.asp> (last visited Apr. 20, 2005) (excludes journals that do not accept unsolicited manuscripts, journals published outside of the United States, and journals that are not principally devoted to legal scholarship).

24. DIV. FOR MEDIA RELATIONS & PUB. AFFAIRS, AM. BAR ASS'N, FACTS ABOUT WOMEN AND THE LAW 2 (1998), available at <http://www.abanet.org/media/factbooks/womenlaw.pdf> (reprinted by permission from *Facts About Women and the Law*); see Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, *Minority Enrollment 1971-2002*, at <http://www.abanet.org/legaled/statistics/minstats.html> (last visited Apr. 20, 2005); ABA, *Legal Educ. and Bar Admission Statistics, 1963-2005*, *supra* note 20 (In the 1971-72 academic year, there were a total of 5568 minority students enrolled in J.D. programs. The total J.D. enrollment for the same academic period was 91,225. This translates to a 6.1% minority enrollment for the 1971-72 academic year.).

25. See ABA, *2004 Enrollment Statistics*, *supra* note 20. These figures are computed using total women J.D. enrollment and total minority J.D. enrollment, divided by overall total J.D.

held faculty appointments. In 2004-05 approximately 47% of law faculties were composed of women, and racial minorities now comprise 16% of law faculties nationwide.²⁶

It comes as no surprise that American legal education has changed over thirty-four years. That change is expected, indeed inevitable, is among the most durable clichés. What is remarkable, however, is how constant Jim has remained in his fundamental character, beliefs, and behavior, even as the world in which he worked, and the wider world around him, dramatically changed. Fashions come and go, fads emerge and recede, trends rise and fall, the scenery changes, but Jim remains stalwart. Neither inflexible nor unreceptive to change—in fact, sometimes a proponent of experimentation—he proceeds always with due regard for stability.

Having known Jim as colleague and friend since we arrived together at the law school, I can, however, bear witness that he has noticeably “evolved”: accomplishment has overcome inexperience—an unerring trajectory inclining to excellence describes the evolution of his work; youthful vigor has given way to mature self-confidence; Lawyers’ League softball seasons, interschool basketball games, and faculty-student gridiron matches have been replaced by the Game of Kings (and, as self-reported, Jim’s golf game has been marked by vast improvement over time); his neckties have got wider, then narrower, and now a little wider again; and so forth.

Yet, Jim’s life has always portrayed, first and foremost, the Stabilizing Virtues that accommodate and manage change: sound judgment, balanced by what Judge Learned Hand described as a quality of mind “which is not too sure that it is right;”²⁷ an uncomplaining willingness to shoulder responsibility and to do what needs to be done; steady resolve in all things; and impeccable loyalty that infuses personal and professional relationships with trust. Several years ago, in a traditional exchange of modest Christmas gifts, Jim gave me a paperweight inscribed with a quotation from Francis Bacon: “Constancy is the Soul of Virtue.” That, in a nutshell, is the way Jim Torke thinks and lives.

Born in Milwaukee, Wisconsin, about two weeks after the Empire of Japan attacked Pearl Harbor, Jim attended public schools in his hometown. He was a high school athlete and, perhaps unrelatedly, acquired the sobriquet, “Turtle.” In 1963 he received his B.S. degree from the University of Wisconsin-Madison. Two years earlier, Bob Dylan had proclaimed, “The Times They Are A-Changin’.” Six months after Jim was graduated, President John F. Kennedy was assassinated. The following year, as the civil rights movement gained momentum, the 1964 Civil Rights Act became law. In March 1965 the small

enrollment. The figures do not include enrollment in post-J.D. and other law school programs.

26. See 2005 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 15, at 828. These figures include full-time faculty, deans, administrators, and librarians who also teach, but exclude part-time instructors.

27. Judge Learned Hand, Remarks at the “I Am an American Day” Ceremony in Central Park, New York City (May 21, 1944), in LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND, at 144 (Irving Dilliard ed., Vintage Books 1959) (1952).

town of Selma, Alabama made national headlines. American "advisors" were in Vietnam, but deployment of American troops was still in the early stages. American college campuses had not yet been radicalized by the war. During the period 1963-65—a time of relative calm in Madison—Jim enrolled at UW Law School but soon withdrew to pursue graduate work in history and then in English literature. Later, accepted into a Ph.D. program at Ohio State University, Jim reversed course and decided to return to law school. In 1968 he earned his J.D., Order of the Coif, from UW Law School.

Jim entered the legal profession with a prestigious judicial clerkship in the chambers of Chief Judge Edward J. Devitt, U.S. District Court for Minnesota, for whom the "Devitt Award" for outstanding public service by federal judges is named. (Some years later, at Jim's invitation, Judge Devitt appeared as the law school's Commencement Speaker.) While working for two years at a top notch law firm in Minneapolis, he took the decision to seek an academic appointment in law.

Jim and his wife, Christine, arrived in Indianapolis in August 1971 with their infant daughter. In due course, daughter Alexia was graduated from Carlton College, earned her M.D. from Indiana University, became a pediatrician and a mother, and is now conducting post-doctoral work at the University of Chicago. Two sons followed: Will, a graduate of Purdue University's School of Engineering, is an electrical engineer working in Austin, Texas; Carl, a Wells Scholar at Indiana University and J.D. graduate of UC Berkeley (Boalt Hall), is based in San Francisco. Chris Torke, wife and mother, and an award winning drama teacher at Brebeuf Preparatory School in Indianapolis, retired in 2000, thereby, once again, beating Jim to the punch.

From his earliest days at the law school, Jim emerged as a respected and influential faculty member among his colleagues. At first, he was welcomed by the senior faculty as the best evidence of their own good judgment in hiring decisions. Soon, Jim was regarded as an equal, and then as a faculty leader. Two years after he arrived, Dean Cleon (Bill) Foust announced his retirement, and the faculty elected Jim to the Dean Search Committee. Three deans later,²⁸ while I did a year and a half stint as acting dean, Jim was the consensus choice to serve as academic dean, a job I had held for five years during Jerry Bepko's exemplary deanship, and which Jim agreed to inherit on an interim basis. At the urging of many colleagues, Jim then stood for the deanship as the only "inside" candidate in a crowded field. Perhaps no other chapter in his storied career at the law school better reveals his character.

The law faculty constitution is a peculiar document in certain respects: outside of the faculty, and within the larger university community, it has no binding effect (if it is consulted at all); within the faculty, it is invoked selectively, or at least irregularly; great "constitutional" themes are subsumed

28. William F. Harvey (1974-79); Frank ("Tom") Read (1979-81); Gerald L. Bepko (1981-86), who went on to become Chancellor of the combined campus of Indiana University and Purdue University at Indianapolis (IUPUI) and Vice-President of Indiana University (1986-2003), and later served as IU's Interim President (2002-03).

within the minutiae of faculty governance; more akin to a statute or set of by-laws than an organic charter, it is often amended. One amendment, with only a ten year pedigree in 1987 (but still on the books), provides that faculty endorsement of a decanal candidate requires a supermajority confidence vote constituting three-fourths (!) of the law faculty. When Jim's vote tally came in at a fraction of a point less than seventy-five percent, he immediately withdrew his candidacy. Unmoved by suggestions that the vote constituted substantial compliance with constitutional intent, and deflecting entreaties that he allow his name to be sent forward for consideration by the chancellor, Jim stood on principle: he would no longer regard himself as a viable candidate. Then, after one of the remaining decanal candidates ultimately was selected,²⁹ Jim had the good grace to remain in his post as academic dean during a semester of transition.

As those events of 1986-87 have faded into the mists of institutional memory, Jim has speculated that their outcome may have borne the earmarks of intervention by a Higher Power. Jim knew that he could effectively lead the law school; he was willing to take on the job; and he stepped forward. Yet, because he did not covet the deanship, disappointment was modulated and fleeting. Freed of administrative duties and ambitions, he happily returned full-time, and with renewed purpose, to teaching and scholarship. When the Faculty Leadership Award was established in 2000, Jim was chosen by his colleagues as the first recipient.

One measure of Jim's enthusiasm for teaching consists in the number and variety of courses he has taught. They include sixteen different courses, from Administrative Law to Wills, Trusts & Future Interests; from Civil Rights to Federal Jurisdiction; from a Seminar in Copyright Law to a Seminar in Mass Communications; and, in his principal areas of interest, courses in Civil Procedure, Constitutional Law, and Jurisprudence. Manifest in Jim's eclecticism is also the commitment he brought to his enterprise. Preparing and teaching new courses is hard work. Yet, for a dedicated teacher it is a way of sustaining vitality and achieving renewal, as Jim's example makes plain. Jim's *gift* for teaching is revealed in the popularity he has enjoyed, and respect he has commanded, among his thousands of students. For example, in six separate years (and as recently as 2005) students in the law school voted to confer on him the Black Cane Award as the faculty's outstanding teacher.

Jim also has taught in other venues. Early in his career he was a visiting associate professor at the University of Illinois College of Law. Exporting his knowledge and skills to the wider community in Indianapolis, he exposed the foundations of law and legal institutions to high school students and civic groups. More recently, he went to the People's Republic of China as resident professor in the law school's 2002 China Law Summer Program at Renmin University of China School of Law in Beijing. (Although not an ardent traveler, his spirit of

29. Norman Lefstein, formerly of the University of North Carolina School of Law, began his fourteen year deanship in January 1988. He was succeeded by Anthony A. Tarr who in 2005, after three years as law dean, took up the presidency of the University of the South Pacific. Professor Susannah Mead, academic affairs dean in both administrations, was designated interim dean.

adventure persists and sometimes overcomes.)

As a legal scholar, Jim has a record of notable virtuosity. His writings include a multivolume treatise,³⁰ book reviews,³¹ commentaries,³² essays and articles in a variety of legal journals,³³ and five unpublished textbooks.³⁴ His writing is trenchant and pellucid. It is not too spare, yet is never prolix. It is eminently "readable." Not inclined to showy displays of rhetorical flourish, Jim has the deft ability to choose *just* the right word; the imagination to create the apt and memorable turn of phrase; and the skillful writer's instinct intelligently to deploy stylistic elements, such as metaphor and allusion, which both decorate his prose and render complicated ideas more accessible.

James W. Torke and Kenneth M. Stroud, *Indiana Pleading & Practice*,³⁵ a six volume treatise, is a standard reference on Indiana civil practice and procedure. Jim is the co-author of four volumes and the sole author of two,

30. JAMES W. TORKE & KENNETH M. STROUD, *INDIANA PLEADING AND PRACTICE WITH FORMS* (Matthew Bender 1983-2004).

31. Book Review, 6 IND. L. REV. 624 (1973) (reviewing ROBERT MCCLOSKEY, *THE MODERN SUPREME COURT* (1972)); *Special Book Review*, 62 KY. L.J. 452 (1974) (reviewing B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1972)); Book Review, 11 IND. L. REV. 501 (1978) (reviewing BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977)); *Red, White and Blue: A Critical Analysis of Constitutional Law*, 13 LEGAL STUD. F. 101 (1989) (book review); "*Grand Theory*" and *Constitutional Change*, 26 IND. L. REV. 677 (1993) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)); *Robert M. O'Neil, Free Speech in the College Community*, 24 J.C. & U.L. 699 (1998) (book review); *The Aesthetics of Law: On Beauty and Being Just*, 48 AM. J. JURIS. 325 (2003) (book review).

32. *A Look at the Constitutional Law Texts*, 31 J. LEGAL EDUC. 688 (1981) (reviewing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978) and JOHN E. NOWAK ET AL., *HANDBOOK ON CONSTITUTIONAL LAW* (1978)); *On Teaching Law to High School Students*, 15 LEGAL STUD. F. 167 (1991).

33. *The Future of First Amendment Overbreadth*, 27 VAND. L. REV. 289 (1974); *Survey of Recent Developments in Indiana Law: Constitutional Law*, 8 IND. L. REV. 94 (1974); *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 IND. L. REV. 543 (1976); *Some Notes on the Proper Uses of the Clear and Present Danger Test*, 1978 BYU L. REV. 1; *The Judicial Process in Equal Protection Cases*, 9 HASTINGS CONST. L.Q. 279 (1982); *What Price Belonging: An Essay on Groups, Community, and the Constitution*, 24 IND. L. REV. 1 (1991); *Assessing the Ackerman and Amar Theses: Notes on Extratextual Constitutional Change*, 4 WIDENER J. PUB. L. 229 (1994); *The English Religious Establishment*, 12 J.L. & RELIGION 399 (1996); *Introductory Remarks: Enumerated and Reserved Powers: "The Perpetually Arising Question,"* 32 IND. L. REV. 3 (1998); *Nepotism and the Constitution: The Kotch Case—A Specimen in Amber*, 47 LOY. L. REV. 561 (2001); *What Is This Thing Called The Rule of Law?* 34 IND. L. REV. 1445 (2001).

34. *The Right to Be Let Alone: Constitutional Law, Personal Choice, and Privacy* (1986) (635 pages); *Man the Rulemaker: An Introduction to Law and the American Legal System* (1991) (190 pages, with Teacher's Guide); *Materials on the Amendment of Constitutions* (1993) (361 pages); *Readings on the Rule of Law* (1993) (519 pages); *Selected Provisions from Constitutions of the World* (2004) (140 pages).

35. TORKE & STROUD, *supra* note 30.

which he revised and updated semiannually for more than 20 years. This treatise, comprehensive in scope and meticulous in detail, stands as a masterful exposition of Indiana's adjective law.

One of Jim's earliest articles, *The Future of First Amendment Overbreadth*—which was followed by thirty years of scholarly verisimilitude—appeared in the *Vanderbilt Law Review*³⁶ in 1974. In a confident and leading-edge analysis, Jim challenged the Warren Court's justification for invalidating statutes on the basis of "overbreadth," arguing that a different, more legitimate, concern explained the Burger Court's more cabined application of the doctrine.

Whatever its virtues or currency, overbreadth remains an impressionistic doctrine, often so vague and flexible as to be guilty of the very vice it condemns.³⁷

...

The key to discovering the paths by which the Court is "retreating" from its overbreadth holiday of the sixties lies in the recognition that the central dynamic of overbreadth is the peril posed by standardless administration rather than the threat of a chilling effect on first amendment rights.³⁸

Jim's forecast of the Court's future application of the overbreadth doctrine presciently predicted a course of action that would become but one aspect of a wider doctrinal shift within the Court overtime, now sometimes labeled the "New Federalism."³⁹

[S]ince uncontrolled discretion rather than chilling effect has been the real, if not the rhetorical, dynamic of overbreadth, a growing willingness to trust to the informed good faith of state officials will lead to a greater demand that complainants make a showing of incorrigibility not unlike the "bad faith" sought in cases like *Younger v. Harris*.⁴⁰

...

[T]he new Court majority has utilized the numerous potential routes of escape from the overbreadth technique, routes through which a Court bent on deferring to the states can readily come and go⁴¹

36. Torke, *The Future of First Amendment Overbreadth*, *supra* note 33.

37. *Id.* at 295.

38. *Id.* at 309.

39. See, e.g., Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 11 (2003) (providing an overview of the new federalism); Daniel A. Farber, *Pledging A New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133 (2000); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 618 (1995) (reflecting on *United States v. Lopez* and discussing the origins of the new federalism).

40. Torke, *The Future of First Amendment Overbreadth*, *supra* note 33, at 293.

41. *Id.* at 309-10.

Here was a young scholar already engaged in serious doctrinal scholarship, both normative and prescriptive. Many articles employing similar techniques were to follow, treating topics as diverse as *res judicata*; the "clear and present danger" test; equal protection methodologies; enumerated and reserved powers; and extra-textual constitutional change.

Occasionally, such doctrinal excursions were vehicles for indulging Jim's penchant for historical investigation, as when he traced the arcane history of river pilotage in the Mississippi Delta. Not content to consult the historical accounts of this uniquely nepotistic culture, he traveled to New Orleans to conduct interviews with working river pilots. All of this provided background and context for his analysis of the equal protection clause as applied to nepotistic practices—a largely unexplored backwater of constitutional law. Jim is not a contrarian, exactly, but he knows his own mind. He described the Supreme Court's principal case on the subject as "a specimen in amber,"⁴² concluding, in effect, that the Court had traveled a gravel road in arriving at the right place, albeit a mostly solitary outpost in a widening equal protection landscape.

Yet, Jim's scholarship often departed from more traditional doctrinal methodologies. For example, he has written elegantly and at length about the role of groups and communities within society and within the constitutional schema.⁴³ Returning from Sabbatical Leave as an Academic Visitor at Oxford, he published an insightful and extensive meditation on the religious establishment in England, drawing thoughtful comparisons with the separation of church and state in America.⁴⁴ More recently, he produced a small gem of jurisprudential reflection on what he termed "the aesthetics of law."⁴⁵

Law's potential for beauty seems rather like the beauty that justice may reflect. But law is not a generalized idea of justice; it fits within a particular tradition which gives it a singular and contextual character. Law's beauty . . . may be said to represent the beauty which a common law system is apt to achieve: each decision may be an embellishment; many together may form a graceful curve, the shape of which seems, from the present, inevitable.

There may also be a kind of beauty peculiar to law in what we might call its architecture.⁴⁶

. . .

Recognizing that law can be beautiful may likewise bring greater pleasure and purpose to those of us who work in the law.⁴⁷

42. Torke, *Nepotism and the Constitution: The Kotch Case—A Specimen in Amber*, *supra* note 33.

43. Torke, *What Price Belonging: An Essay on Groups, Community, and the Constitution*, *supra* note 33.

44. Torke, *The English Religious Establishment*, *supra* note 33.

45. Torke, *The Aesthetics of Law: On Beauty and Being Just*, *supra* note 31.

46. *Id.* at 331-32.

47. *Id.* at 333.

In these words we can detect at least part of the reason for Jim's success in his realm of the legal profession: he has gladly embraced his work and pursued it with constant purpose.

During a certain period of time now past, Jim locked on to the notion that he could disguise his voice on the telephone and have me believe that something I said or did had become a matter of interest to his imaginary interlocutor—perhaps the Attorney General of the United States, or a disgruntled student, or the head of an investigatory commission. I will comment on these efforts at misdirection by employing a conceit that has become fashionable, yet remains disconcerting: the conveyance of information through questions posed and answers given, each and all by the same person. Does Jim regard himself as an adept impersonator? Apparently, yes. Is he correct in his assessment? Sadly, no. Did I occasionally feign ignorance of his cunning? Gleeefully, yes. Did Jim's imposture ever fool me? Candidly, no. Did exposure deter him from further attempts at harmless pretense and deceit? Happily, no. Was I always amused and delighted by his audacious, if unsuccessful, ploys? Absolutely, yes. And, when we met as friends at thousands of lunches and dinners and on countless other occasions, did his intelligent repartee, witty insights, and wry observations invoke smiles and laughter, time and time again? Yes, and yes again.

During his thirty-four years at the law school, Jim Torke has been a signal force for the good and the right. With his retirement, will Jim's companionable, collegial, and guiding presence in Inlow Hall be profoundly missed? This is a rhetorical question.

SYMPOSIUM

THE LAW AND ECONOMICS OF DEVELOPMENT AND ENVIRONMENT: AN INTRODUCTION TO THE SYMPOSIUM

DANIEL H. COLE*

Once upon a time, environmentalists blamed economic development and growth for the world's environmental problems. Industrialists, economists, and political leaders, meanwhile, complained that overly expensive environmental protection measures obstructed economic growth and development. In the last thirty years, however, it has become increasingly clear that economic development and environmental protection are not mutually exclusive goals; to the contrary, they are to a large extent mutually interdependent. This mutual interdependence has become obvious in many developing countries of the world, which struggle under the combined weight of economic stagnation and severe environmental problems, such as lack of potable water. Indeed, poverty is almost certainly the single most important environmental risk factor. Even where combined economic and environmental problems are less severe, the abilities of countries to either develop their economies or protect their environments are subject to institutional (including legal) and technological constraints.

Several of the most pressing issues in the world today, from global climate change and sustainable development to biotechnological innovation and trade liberalization, entail special implications for less developed countries (LDCs) and their natural environments. Genetically modified organisms, for example, hold out the promise of improving food supplies in LDCs, but also create significant new environmental risks. Meanwhile, most scientists have become convinced that the earth's climate is in the process of changing, in part because of anthropogenic emissions of carbon into the atmosphere; and they expect LDCs to bear the brunt of the impacts from climate change. Yet, policy makers seem more interested in arguing about LDC participation in global institutions to reduce greenhouse gas emissions, rather than figuring out how LDCs are going to cope, and how the developed world might help them cope, with the effects of climate change.

These and other issues relating to environment and development are inherently interesting and important; they include several "hot topics" among academics and policy makers. However, much of the existing analyses of these problems are single-disciplinary, focusing exclusively on legal regimes, economic institutions, or political structures, as if combined and multifaceted

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issues of development and environment could be comprehended and resolved without heterogeneous interdisciplinary approaches and methodologies.

For these reasons, in January 2005 the Indiana Law Review sponsored a conference on the law and economics of development and environment, which brought together diverse scholars from various disciplines to share their research into combined developmental and environmental issues. We were fortunate to secure the participation of five truly outstanding scholars from the fields of law, economics, and political science. Their contributions, the final versions of which are presented in this symposium issue of the Indiana Law Review, enhance substantially our understanding of the combined legal, economic, political, and environmental problems developing countries face, and point the way towards possible solutions. What follows is a brief introduction to the papers in order of publication.

First, the eminent economist Thomas Schelling, Professor Emeritus of Economics at Harvard University and the School of Public Affairs at the University of Maryland, brings his unique intellectual creativity to bear on the problem of global climate change, particularly as it relates to economic development in LDCs. While most economists have been debating various policies for regulating greenhouse gas emissions,¹ Professor Schelling has been more concerned with the *costs* (or effects) of global climate change, which scientists expect will fall mainly on those countries—the LDCs—that can least afford them. He suggests that, instead of forcing LDCs to participate in regulatory regimes to limit emissions, the developed countries of the world ought to be doing more to help the LDCs develop socially, institutionally, and economically, so that they will be better able to cope with the effects of climate change as those effects materialize.

Second, the prominent political scientist Elinor Ostrom, the Arthur F. Bentley Professor of Political Science and Co-Director of the Workshop on Political Theory and Policy Analysis at Indiana University, Bloomington, and her co-author Tanya Hayes of the Center for the Study of Institutions, Population, and Environmental Change at Indiana University, address a distinct but related issue facing LDCs: deforestation. They present a comparative institutional analysis, based on empirical evidence, which challenges the presumption that

1. See, e.g., Joseph E. Aldy, Scott Barrett & Robert N. Stavins, *Thirteen Plus One: A Comparison of Global Climate Policy Architectures*, 3 CLIMATE POL'Y 373 (2003) (recommending a global greenhouse gas emissions trading system); Daniel H. Cole & Peter Z. Grossman, *Toward a Total-Cost Approach to Environmental Instrument Choice*, in AN INTRODUCTION TO THE LAW AND ECONOMICS OF ENVIRONMENTAL POLICY: ISSUES IN INSTITUTIONAL DESIGN 225 (Timothy M. Swanson ed., 2002) (suggesting that technology-based standards might be as efficient as taxes or tradeable emissions permits if emissions monitoring proves costly, which is likely to be the case, especially for LDCs); William D. Nordhaus, *After Kyoto: Alternative Measures to Control Global Warming*, Paper prepared for a Joint Session of the American Economic Association and the Association of Environmental and Resource Economists (Jan. 4, 2001) (recommending a global carbon tax for greenhouse gas emissions), available at http://www.econ.yale.edu/~nordhaus/homepage/PostKyoto_v4.pdf.

public ownership and management of forest resources is always the best, let alone the only, way effectively to conserve those resources. Professor Ostrom and Ms. Hayes expose as a myth the notion that resource conservation requires that resource use decisions must be taken out of the hands of local people and delegated to governments. In fact, resource conservation requires legal and institutional linkages between state actors and local resource users/protectors.

Third, Timo Goeschl, Professor of Environmental Economics at the University of Heidelberg, and his co-authors Rupert Gatti (University of Cambridge), Ben Groom (University College London), and Tim Swanson (University College London), demonstrate that international legal regimes designed to conserve scarce biological resources may be counter-productive, if they create inefficient incentives for government actors. The authors find that the institutional framework governing the international management of biological information, under the United Nation's Convention on Biological Diversity (CBD)² and the World Trade Organization's agreement on Trade-Related Intellectual Property Rights (TRIPS),³ has not slowed the destruction of genetic resources in LDCs located within the world's equatorial regions, which are home to the majority of the world's biological information. They explain how this institutional failure may be due to an inappropriate incentive structure that induces source countries for bio-information to use (or threaten) resource degradation as a strategy to obtain additional compensation from countries that import biological information in order to develop valuable new biotechnologies.

Fourth, Ruth Greenspan Bell, who is an island of legal scholarship in a sea of economists at the non-partisan "think tank" Resources for the Future (and a former Senior Attorney at the Environmental Protection Agency and Senior Advisor at the U.S. State Department), brings her expertise to bear on LDC environmental policies. Specifically, she asks, which regulatory instruments should LDCs use to protect their environments as their economies develop? In recent years—particularly since the great success of the acid rain emissions trading program in the United States⁴—economists and policy makers around the world, including international development banks, have been pushing for countries, including LDCs, to completely replace expensive command-and-control regulations with more market-friendly approaches, such as effluent taxes and tradeable permits.⁵ Ms. Greenspan Bell cautions us about institutional and

2. United Nations Conference on Environment and Development, Convention on Biological Diversity, Jan. 5, 1992, 31 I.L.M. 814 (1992).

3. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994).

4. See, e.g., DANIEL H. COLE, POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION 51-57 (2002).

5. See, e.g., ENTERPRISE FOR THE ENV'T, THE ENVIRONMENTAL PROTECTION SYSTEM IN TRANSITION: TOWARD A MORE DESIRABLE FUTURE (1997); THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY (Marian R. Chertow & Daniel C. Esty eds., 1997); Richard B. Stewart, *Models for Environmental Regulation: Central Planning versus Market-Based*

technological constraints in developing countries that might render such market-based approaches less effective and possibly more expensive than traditional forms of regulation, such as technology-based standards.

Fifth, Lakshman Guruswamy, the Nicholas Doman Professor of International Law and Director of the Energy & Environmental Security Initiative at the University of Colorado, writes about what is certainly one of the greatest challenges of the twenty-first century: to meet increasing global energy demand within the framework of sustainable development. In particular, how will developing countries meet the growing energy demands of their economies, while they and the rest of the world attempt to resolve the many problems associated with burning fossil fuels? Professor Guruswamy's analysis suggests that no answer to this question is currently available because of the absence of a coherent institutional (that is, international legal) framework in which to resolve the tension between growing energy demand for development and the need to reduce environmental problems associated with fossil-fuels. He offers a research agenda, however, which might help pave the way toward an effective institutional solution.

These five symposium papers identify important problems at the intersection of development and environment, challenge preconceptions about those problems as well as conventional solutions, and point the way toward alternative, potentially more effective, solutions. Just as importantly, the symposium authors demonstrate the great utility of interdisciplinary work. Among the most gratifying aspects of the conference was the high level of interest the authors showed in one another's presentations. Scholars who previously did not know each other (or each others' works) began planning collaborative projects. Hopefully, those future collaborations will contribute as much as the present collection of papers does to both the substantive analysis of combined environmental and developmental issues and the evolution of useful methodologies for analysis.

Finally, I would be remiss if I did not recognize the extraordinary efforts of the editors of the Indiana Law Review, particular the Editor-in-Chief, Seth Thomas, and the Symposium Editor, Katie White, in planning, organizing, and executing this successful venture.

Approaches, 19 B.C. ENVTL. AFFAIRS L. REV. 547 (1992); Theodore Panayotou, Economic Instruments for Environmental Management and Sustainable Development, Paper prepared for the United Nations Environment Programme's Consultative Expert Group Meeting on the Use and Application of Economic Policy Instruments for Environmental Management and Sustainable Development, Nairobi, Feb. 23-24, 1995 (1994), *available at* http://www.conservaionfinance.org/Documents/CF_related_papers/panyouto_econ_instru.pdf.

WHAT MAKES GREENHOUSE SENSE?

THOMAS C. SCHELLING*

We have had “global warming” for more than a decade—the hottest decade on record worldwide. Is this the “greenhouse effect” that scientists have been warning about, i.e., a response to increased carbon dioxide in the atmosphere, or is it some natural, rather than man-made, climatic change?

The Intergovernmental Panel on Climate Change (IPCC) has cautiously proposed a “discernible” human influence. The IPCC is a cautious body not disposed toward outright conclusions. Actually, most of the several climate models do not predict the sudden increases in temperature of recent years.

Something is going on. What does it tell us about the need to curtail, drastically, carbon emissions during the coming century?

The popular guessing game—do we see a greenhouse “signature,” can we identify a clear “signal” in the “noise”—is probably premature. (The metaphor of “signal to noise” is inappropriate here: noise is random, while the problem here is that there are several competing “signals” to sort out.)

The history of climate shows that sudden changes of global atmospheric temperature have occurred. There are random or chaotic influences on global climate. “El Niño” is an example, volcanic emissions are another. There are human influences besides greenhouse gases: aerosols of dust and, especially, sulfur emissions can block incoming sunlight; urbanization can produce “heat islands” that affect local temperature estimates. Finally, most of the globe is ocean. Relative to air the specific heat of water is great and the oceans act as a huge cooling reservoir that delays by probably decades the arrival of atmospheric warming.

So the recent temperature record is unlikely to be conclusive on the cause of the warming. Greenhouse warming is not clearly established by the temperature record, nor is it in any way ruled out. We may see the greenhouse “signal” clearly in another decade or two. Meanwhile we have to rely on what science can tell us.

There are a few indisputable facts about the “greenhouse” phenomenon. One, well understood for more than a century, is that a high density of greenhouse gases, as on Venus, can cause surface temperatures many times the boiling point of water, while the absence of such gases, as on Mars, makes surface temperatures too low for water to exist in liquid form. (Distance from the sun makes a difference but cannot account for the gross disparity.) Earth is unique in our solar system for its temperature range, and greenhouse gases are responsible.

Another well understood fact is that carbon dioxide molecules absorb infra-red radiation. This is easily measured in the laboratory. Carbon dioxide is transparent to incoming sunlight. But as the earth, warmed by daylight sun, radiates energy back into space it does so in the infra-red part of the electromagnetic spectrum, and the carbon dioxide in the air absorbs some of the

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energy and gets warm. (Citrus growers in California and Florida use smudge pots—ceramic tubes of burning crude oil—to produce on a clear still night a blanket of carbon dioxide that captures some of the heat radiating from the ground and keeps the fruit from freezing.)

Carbon dioxide is only one of several gases that have that property. The most important one is water vapor, and part of the estimated enhancement of temperature is the positive feedback of warming on absolute global humidity.

(Incidentally, actual greenhouses do not produce the “greenhouse effect.” Rather, they mainly trap the air that is warmed by contact with the ground that is warmed by the sun. We should have called it the “smudge pot effect.”)

I find the case for prospective greenhouse warming to be convincing. In large part the uncertainties are not about whether greenhouse warming is going to be real, but about the magnitude and speed of warming and about the variegated climatic effects—not just “warming,” but all the changes in precipitation, humidity, sunlight and clouds, storms, and variations between night and day, summer and winter, polar regions and tropical, mountains and plains, and east and west coasts.

In the two major unspecialized scientific journals, *Science* and *Nature*, one has to go back a decade or two to find serious doubts about the basic science. Rarely is there such scientific consensus as there is on whether the greenhouse effect is real, even though it can not yet be uncontrovertibly detected in the recent climate record.

But the uncertainties are daunting. The best the IPCC can do—apparently the best anyone can do—is to give us a range of possible warming for any given increase in carbon dioxide. And the upper bound of that estimated range has been, for over twenty-five years, three times the lower bound!—an enormous range of uncertainty.

On top of that are the uncertainties of what the changes in temperature will do to climates around the world, what those climate changes may do to the worlds we live in, and what peoples in different climates can do to adapt successfully.

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As a policy issue this is a new subject. Just as nuclear weapons required an unprecedented reorientation of military thinking, a reorientation that took some decades, and modern terrorism has recently required a reorientation of homeland security thinking, a reorientation that is barely begun, the prospect of possible changes in climate greater than any that have occurred in the past 10,000 years has had only a decade or two to generate ideas on how to cope with this ineluctably global problem.

I will illustrate from personal experience. In the 1970s, during what was called the “energy crisis,” I was a member of two panels, each consisting of twenty experts from economics, petroleum engineering, nuclear engineering, public health, international relations, environmental science, and other pertinent disciplines. One panel had to do with the likely future of nuclear energy and the other was concerned with the future of energy policy in the United States. The

first published a book, *Nuclear Power: Issues and Choices* in 1977,¹ the second, *Energy: The Next Twenty Years* in 1979.² What could have been more pertinent to nuclear issues than the evident fact that nuclear fission produces no carbon dioxide? And what turned out to dominate energy and environmental disputes before the next twenty years had passed? And what did these two careful studies have to say about global warming? The nuclear book, out of 400 pages, had two pages on carbon dioxide. The 600-page book oriented toward the coming two decades had ten scattered references amounting to less than ten pages.

Thinking about warming and climate had not begun among “experts” concerned with energy policy nor had it yet attracted concerted attention among scientists in the several pertinent field of atmospheric chemistry and physics, meteorology, oceanography, agronomy, marine biology, glaciology, ecology, or paleoclimatology.

By 1992 the largest intergovernmental conference ever assembled, with heads of state from more than a hundred nations (including the United States), was focused on global environmental issues, with climate change at the center. In Rio de Janeiro the conference produced the “Framework Convention on Climate Change,” promptly ratified by the United States.

Five years later, in Kyoto, a “protocol” to the Rio treaty was drafted (and signed by the United States), requiring very substantial reductions in CO₂ emissions for the developed countries over the next dozen years. It finally went into effect in February 2005, having been ratified as required by nations accounting for fifty-five percent of total world emissions of carbon dioxide. The Clinton administration let the Kyoto document languish for three years, and President Bush declared it unsuitable shortly after his inauguration. Russian ratification, which tipped the fifty-five percent threshold, was widely viewed as opportunistic, as the Russian economy’s slump from 1990, the baseline from which reductions were to be measured, had made it likely that Russia would not need to restrict emissions and might even sell excess emission rights—dubbed “hot air” by commentators—to participating nations that could partially fulfill their obligations by such purchases.

While the Bush dismissal of “Kyoto” sounded harsh and unfriendly, compliance with what had been assented to in 1997 was almost certainly infeasible by 2001, nothing having been done to identify what policies, including new legislation, might be required to meet the U.S. obligation. Whether Kyoto will turn out to be a “first step” in an international effort to cope with climate change remains unclear.

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While the uncertainties about the magnitude of likely climate changes and their impact need not preclude precautionary steps to anticipate and to cope, they

1. NUCLEAR ENERGY POLICY STUDY GROUP, *NUCLEAR POWER: ISSUES AND CHOICES* (1977).

2. HANS H. LANDSBERG, *ENERGY: THE NEXT TWENTY YEARS* (1979) (report by a study group sponsored by the Ford Foundation and administered by Resources for the Future).

certainly preclude any definitive regime of obligatory limits on national emissions of carbon dioxide (and other greenhouse gases) for some decades to come. Ultimately what matters is not any annual emissions rate but what the limit should be on the concentration of greenhouse gases in the atmosphere, i.e. on the cumulative emissions over all the decades to come minus what gets permanently absorbed in the oceans or somewhere else.

As mentioned earlier, the average temperature change for any given concentration is uncertain by at least a factor of three, i.e., the upper estimate is at least three times the lower ("at least" because those estimates are not absolute bounds.) So even if we knew what the limit should be on the change in average global temperature, which we do not, we would still be wide by a factor of three. And how much of the emitted CO₂ will be absorbed by the oceans is a further uncertainty; currently it appears that something like two-fifths is being absorbed somewhere—in the oceans, in vegetation, in the soil—but whether the oceans will be as ready to absorb the gas when the oceans themselves have higher surface concentrations is not confidently predicted.

A further complication, as far as quota regimes are concerned, is that whatever may be the ultimate limit on the total carbon in the atmosphere, the trajectory of emissions should almost certainly—and differently from country to country—continue to increase for at least some decades before leveling off and eventually turning sharply down. There are several reasons.

One reason is that better and cheaper technologies for mitigation will become available, the longer we wait, especially if we invest heavily in the improved technologies to make sure they become available when we need them. A second reason is that anything we can postpone for twenty years becomes drastically cheaper if we can invest the equivalent cost at five or six percent and invest the proceeds in mitigation twenty years from now. A third reason is that postponement avoids the scrapping of costly capital assets that have substantial lifetimes left, like electric generating plants. A fourth reason is that later generations will almost certainly enjoy higher incomes than ours and be better able to afford any costs of switching to new energy sources. A fifth reason is that we should have a better understanding, in each successive decade, of what and how much needs to be done to slow down the global warming.

Kyoto focused on near-term emissions. That probably made sense. There undoubtedly is, as the U.S. National Academy of Sciences reported a decade ago, some "low hanging fruit" to be harvested—opportunities to reduce emissions significantly at little or no cost. They are mostly once-for-all, not indefinitely exploitable. These are things we know will eventually prove justified, and postponing them merely loses time.

A reasonable question is why, after more than a dozen years of intense investigation, the basic uncertainties about the magnitude of projected changes have not been reduced. Part of the answer is probably that no official body has been willing to commit itself to defending a quantitative challenge to the standing estimate. An important part is probably that climate science, like brain science or genetics, turned out to be much more complex than was originally appreciated, early in the recent concern with global warming. Twenty-five years ago the oceans were modeled mainly as cooling reservoirs. Now ocean currents are seen

as active participants in the circulation of heat, and that circulation depends on temperature and salinity at different depths and the turbulence on the surface due to winds. Clouds were little understood, and unable to play an active role; now clouds are understood to be reflectors of incoming radiation or absorbers of outgoing radiation depending on their altitude, density, droplet size, and geographical location. It was known that particles of dust in the atmosphere, and especially of sulfur (historically from some volcanic eruptions), could significantly reflect incoming sunlight; but there were no reliable studies of the amounts in the air, their geographical distribution, or their residence time.

A major scientific coincidence was the burgeoning availability of satellite reconnaissance of oceans, clouds, glaciers, forests, sea ice, airborne particles, and atmospheric temperatures that paralleled the concern for climate change. With the cascade of new knowledge came new appreciation of the complexity of interactions among atmospheric, oceanic, and terrestrial phenomena, including human activity.

* * * *

Without being able to forecast the speed or even the nature of climate change—"warming" is just a shorthand expression for what will motivate the changes—we can still try to foresee the kinds of impacts those changes may have. But here we must be careful: there is a strong temptation—I know because I have been experiencing it for twenty-five years—to think of changes in climate superimposed on life as we know it, or know of it. Climate change may become serious, if little or nothing is done about it, in the second half of this century and, even if substantial mitigating efforts are undertaken, toward the end of the century. To discern the likely effects we have to try to imagine the world as it may be in sixty, eighty, or a hundred years.

How do we do that? A possibility, just to acquire some perspective, may be to imagine how we might have reacted—"we" being our children's grandparents or great-grandparents—if, say, eighty years ago global warming and attendant climate changes of the kind now being discussed had been seriously considered. Several thoughts occur to me. One is that people in the United States, with "warming" on their minds, would have been more interested in milder winters than in hotter summers. A second is that, where summer was concerned, a major worry might have been mud. Automobile tires were skinny, hard as wood (with sixty pounds per square inch pressure), and absolutely no good in mud. Bicycles were no good in mud and walking was difficult. It might not have occurred to us (to them) that before the century was out the country would be paved almost solid.

Pursuing this line of thought we could ask, if the climate change so predicted in 1925 had actually occurred by now, how might a farm boy of that time who stayed on the farm and lived to the present reflect on the changes that had occurred during his lifetime? Would the change in climate stand out?

My guess is that that now aged farmer would be more impressed with the disappearance of the horse; with the coming of electricity, telephone, and radio

(let alone television); with hybrid corn, antibiotics, and pesticides; with still having most of his original teeth; and with having college graduate grandchildren whom he could visit easily 2000 miles away. He might not notice milder winters: he has gloves and boots and parkas that did not exist when he was a boy, his car has a heater and, in case his road is not plowed, he has snow tires (and air conditioning for the summer). His agricultural technology has changed so much he is not sure what difference any change in climate may have caused to agricultural productivity.

Seventy years ago we did not have electronics, radioisotopes, nuclear energy, antibiotics, genetics, satellites, or even plastics—it was all silk, rayon, isinglass, and celluloid. How do we possibly foresee seventy years from now?

Still, we can assert a few things with some confidence. Most production for market in developed countries is substantially immune to climate. We can assemble automobiles, refine oil, transmit radio and TV, do open-heart surgery and banking and insurance, perform symphonies, manufacture pharmaceuticals, teach classes, operate airlines, and hold golf tournaments in Massachusetts, Washington, Texas, Georgia, or Michigan, even in Alaska as far as climate is concerned. Only agriculture and animal husbandry, forestry, fisheries, and outdoor recreation are susceptible to climate in the United States and in most developed countries. Agriculture, forestry and fisheries are no more than three percent of the U.S. gross domestic product. If the cost of producing raw food and lumber doubled over the next sixty or seventy years, it would reduce gross product by three percent while that same gross product doubled from ordinary productivity growth. We would double our per capita income in 2067 instead of 2065.

It is different for developing countries, many of whom depend on agriculture for a third or half of their gross product while as much as two-thirds of the population may depend on agriculture for a living. While it is not certain that the likely changes in climate would everywhere be adverse to farming, at least in those countries people are potentially vulnerable in a way that we in America are not. Additionally there could be serious health consequences: many vector-borne diseases become more virulent in hotter climates, and their prevalence could extend further as subtropical climates become more tropical.

I conclude that most, nearly all, of the adverse effects of likely climate change will accrue to the descendants of those living today in what we call “developing countries” (not all of which are actually developing). First, that is where the people are. Three quarters of them live there today, and it is predicted that seven-eighths of them will live there by the end of the century. Second, they are vulnerable in ways that we are not. Third, they do not have the resources to cope, to adapt, or to defend against adverse weather and climate and what it may do to health and productivity. The nations least able to afford to do anything to abate forthcoming changes in climate are the nations with the most at stake (whether their leaders realize that or not).

To draw this comparison between today’s developed and undeveloped in their vulnerability to potential climate change, however, is also to identify what is likely to be the best defense against changing climate: development. Consider health, malaria in particular. That disease kills more than a million people every

year, a large proportion of them children. Malaria is no problem in the United States, Canada, or Western Europe. Climate does not altogether explain the lack of malaria; malaria got its name in ancient Italy and was serious in the United States a century ago. It is now associated with the tropics.

But consider Singapore and Malaysia, two nations separated by a kilometer of seawater. Their climates are identical. There is virtually no malaria in Singapore; malaria is serious in Malaysia. If anyone living in Singapore does get malaria (by spending a weekend in Malaysia) he or she is probably in good health to begin with and gets necessary medical care. Singapore of course has the advantage of being small and rich, so environmental measures can take care of any mosquitoes. But this is the point of the comparison: Singapore and Malaysia were identical not only in climate but in development forty years ago. Both have developed, but Singapore spectacularly. If Malaysia can reach, through a second forty years of development, where Singapore reached in its first forty years, it should no longer be at the mercy of the mosquito.

Measles kills a million children a year in poor countries, not in the well-to-do. Vaccine is a great help; but what the poor children in developing countries need most, to reduce the impact of measles, is adequate nutrition and freedom from debilitating chronic illness. For that they need development. With development, countries can afford sanitation and safe drinking water, not to mention a public-health infrastructure. The worst effects of deteriorating climate on health can be avoided if poor countries can become non-poor in the coming half century.

Health is just one area in which development can significantly offset the adverse effects of climate change. Development means higher incomes, which in turn mean individuals and governments better able to adapt to changes, and governments better able to participate in global efforts at mitigation. Development also means shifting away from subsistence agriculture and into productive activities less dependent on the weather.

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A few years ago, two thousand American economists published a statement arguing that the nations of the world should adopt a rationing scheme under which every nation would be assigned a quota for carbon emissions, with strong sanctions for failing to meet quota obligations and with a trading system in which nations better able to come in under quota could "sell" unused emission rights to countries finding it more difficult to meet their quota obligations.

Few propositions appeal to economists more than that without clearly defined obligations backed up by the prospect of sanctions international cooperation involving potential major sacrifices cannot be sustained, and that without trading rights any regime will be hopelessly inefficient.

I did not sign the statement. I am an economist who believes in the essentiality of incentives, in clearly defined obligations, and in the virtues of trading. I cannot imagine such a regime for carbon emissions. I have several reasons.

Any serious regime would have to allocate emission rights over many

decades, not just a decade at a time but cumulatively. There is currently no possibility of reaching agreement on whether "acceptable" total emissions over the coming century should be 500 billion tons or 2000 billion tons; in any event, what is ultimately acceptable will depend on the costs of moderating emissions, and these costs are also extremely uncertain.

Because any economical trajectory of annual emissions should grow for some decades before leveling off and declining severely thereafter, with different trajectories for different nations, it would be almost impossible to determine, during the first half-century or so, whether a nation was on target to meet its ultimate cumulative limit. (It would likely be just as hard for the nation itself to know, as for any monitoring secretariat or judicial review body.)

Any stringent regime would involve allocating emission rights worth many trillions of dollars among rich nations and poor, rapidly growing nations and more mature economies, and countries with fossil fuels and countries without. I see no possibility of any such compact being arrived at. If there were such quotas they would certainly have to be renegotiated periodically as estimates changed and as nations experienced greater and lesser difficulties. Any nation that "sold" part of its unused quota would clearly be evidencing a too generous original quota.

Sanctions large enough to be effective deserve skepticism. Punishing poor countries will not be attractive; punishing rich countries, or large countries, or powerful countries, will not be attractive. I can imagine the United States agreeing to quotas it believes it can live with and making serious efforts to live within the quotas; it is hard to imagine any international body or consortium of nations imposing sanctions on the United States, or the United States accepting severe sanctions.

Granting, for argument, the apparent logic that nations will not make sacrifices in the absence of sanctions, there is no historical example of any international regime that could impose penalties on a scale commensurate with the magnitude of global warming. (It is notable that the current most legally cohesive regime, the European Union—certainly stronger than any greenhouse regime that one could imagine—calls for severe penalties on any nation that runs a deficit greater than three percent of gross domestic product for three years running; in 2004 both France and Germany violated the rule, and nothing was expected to happen to those two nations, and nothing did happen.)

Nowhere are there any agreed criteria for allocating half a trillion tons, or a trillion, or two trillion, among almost 200 nations. Undeveloped nations demand the right to "catch up" to the developed in carbon emissions per capita or per unit gross product. Some argue for uniform emissions per capita. All may see carbon quotas as partly cash equivalents, via trading for money, and indeed there have been proposals for allocating carbon quotas as "foreign aid" precisely to facilitate conversion of carbon quotas to cash. Any "democratic" allocation of quotas would require negotiation among nearly 200 countries, some of whom are oil and gas producers that may object to any rationing. And how to penalize a poor country that fails to conform to its quota would require a judicial procedure to authorize sanctions and some enforcement mechanism, which would have to extract financial resources, embargo trade, restrict fossil fuel deliveries, or

otherwise impose penalties or fuel restrictions. Nothing like this has ever existed and it is even hard to conceive.

The World Trade Organization (WTO) might appear to be a model or precedent. It does entail penalties on infractions of the trading rules and it has a judicial body to hear complaints and authorize sanctions. It has worked, but as a model it is not a good fit. WTO is essentially a system of detailed reciprocal undertakings; infractions tend to be bilateral, and specific as to commodities. Offended parties can undertake retaliation and make the punishment fit the crime (thus exercising the principle of reciprocity). Fulfilling or failing WTO commitments is piecemeal, not holistic. There is no overall target to which a WTO member is committed. In contrast, if a greenhouse-regime nation fails to meet its target there is no particular offended partner to take the initiative and penalize the offender. There is no obvious formula to make the punishment fit the crime.

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Is there any precedent, or model, of international cooperation on a scale equivalent to what a greenhouse regime might entail? The North Atlantic Treaty Organization (NATO) is my candidate. NATO, as an organization, grew out of the Marshall Plan, which itself is a model. The division of Marshall-Plan aid was originally determined by the United States, the donor, after receiving tentative “plans” from Europe that amounted to more than was to be made available. Roughly five billion dollars was available for a fifteen month period. (The funds became available on April 1, not July 1.) Funds had to be distributed among countries as disparate as the United Kingdom, Turkey, Norway, Italy, Iceland, and the rest—disparate in their pre-war living standards, their wartime damage, their capacity for reconstruction, and their specific commodity needs. But through the Organization for European Economic Cooperation (OEEC, predecessor of the current OECD) the recipient nations were to negotiate later annual divisions of aid.

To that end, each country submitted detailed statements documenting their needs for hard currency during the coming fiscal year. They projected government expenditures civilian and military, private consumption—including rationed commodities like gasoline, meat, butter, and heating fuel—exports and imports by provenance and destination, feedstock requirements and projected growth in livestock populations, restoration of railroad beds and canals, housing repair and construction, machinery and equipment requirements, and finally, crucially, import requirements that had to be paid for in dollars. An ambitious effort by the Secretariat of the OEEC standardized the accounts and definitions. (“National economic accounts” were new and unfamiliar to several governments.)

Then began a process of reciprocal multilateral scrutiny. Each government was represented by a team of senior officials. Each government team was examined and cross-examined by the other government teams; each defended its projections and demands for aid, revised its claims and defended anew. More aid for one country meant less for the rest.

There was never any formula. "Relevant criteria" developed. The parties did not quite reach agreement, but were close enough that two people, the Secretary General of the OEEC and the representative of Belgium (which was not requesting any aid) offered a division that was promptly accepted. Of course, the U.S. government was insisting on agreement. Today there is no such "angel" behind greenhouse negotiations. Still, this precedent offers encouragement.

NATO went through the same process in 1951-52, the "burden sharing exercise." The same people—by this time on a first-name basis—engaged in the same reciprocal scrutiny and cross examination. Military contributions such as conscription and training; procurement of weapons, ammunition, and vehicles; and contributions of real estate for pipelines, maneuvers, and housing were now crucially involved. U.S. aid was still involved and was the pressure to reach agreement, which was almost attained. This time three people, including the U.S. representative, offered up a proposal that was immediately accepted. U.S. aid tapered off, but the procedures and the teamwork remained.

NATO, for which the Marshall Plan provided the congenial social infrastructure, is the only non-wartime institution in which so many countries cooperated over such high economic stakes. The procedures were not aesthetically satisfying; no formulae were developed, just a civilized procedure of argument and accommodation. Additionally, two of the participating nations, Italy from the outset and Germany soon after, were former enemies of the rest.

NATO nations undertook commitments, heavy commitments, arrived at through the process I described, and generally met their commitments. There were no sanctions on non-performance other than diplomatic argument. By any measure NATO was a success. The camaraderie and tradition of cooperation engendered by the Marshall Plan were immensely helpful. We have no such auspicious tradition to undergird the international greenhouse effort, but NATO is the only historical model I can find.

* * * *

A striking difference between commitments under NATO, or under WTO, and commitments under the Kyoto Protocol (or almost any other greenhouse regimes that have been proposed) is the difference between commitment to actions and commitment to results. NATO governments argued over what they would actually do: raise troops, train and deploy them; procure vehicles, arms, and ammunition; submit to an international command structure; and, if it came to that, to defend each other's territory as if it were their own.

The expected results were deterrence of attack or, if deterrence failed, defense. There was no way to measure how much added deterrence the Dutch contributed, or the Norwegians, or the British. The only way to assess how much the Dutch would, in the event, have contributed to slowing down a Soviet-bloc attack would be to count their troops and weapons. Essentially, "inputs" were visible and measurable; "outputs" in the form of deterrence or successful defense were conjectural, judgmental, not measurable.

As in NATO, commitments in WTO were to what nations would do, or refrain from doing. There are no commitments to particular consequences. No

WTO member nation is committed to imports of any sort from anywhere; it is committed only to actions, or abstentions, regarding tariffs and other restrictions, subsidies, and tax preferences.

In the Kyoto Protocol, commitments were not to actions but to results that were to be measured after a decade or more. A disadvantage is that no one can tell, until close to the target date, which nations are on course to meet their commitments. More important, nations undertaking results-based commitments are unlikely to have any reliable way of knowing what actions will be required, i.e., what quantitative results will occur on what timetable for various actions. The Kyoto approach assumed without evident justification that governments actually knew how to reach ten or fifteen year emissions goals. (The energy crisis of the 1970s did not last long enough to reveal, for example, the long-run elasticity of demand for motor fuel, electricity, industrial heat, etc.) A government that commits to actions at least know what it is committed to, and its partners also know and can observe compliance. In contrast, a government that commits to the consequences of various actions on emissions can only hope that its estimates, or guesses, are on target, and so can its partners.

* * * *

Comprehensive estimates of climate change are invariably gradual. That is mainly because climate-change models reflect, naturally, what is known about the behavior of climate, and what is not known, of course, is not known. Are there potential abrupt, large-scale transitions that can be realistically imagined. Are there potential catastrophes that should be gripping our attention?

Two have been seriously studied. One is the possible attenuation of the oceanic circulation involving the downward plunge of ocean-surface water in the northern Atlantic near the arctic circle and the corresponding northward surface flow of the Gulf Stream that warms Western Europe. (Madrid shares its latitude with Cape Cod, Copenhagen with Hudson Bay.) There is some evidence that in earlier geological eras the Gulf Stream may not have existed, or was substantially attenuated. There are some estimates that global warming may influence the temperature and salinity of northern Atlantic waters and reduce the circulation on which the Gulf Stream depends. That could mean a severe cooling of western Europe as a result of global warming.

The other, more ominous, possibility relates to a body of ice known as the West Antarctic Ice Sheet. This is "grounded" ice, attached to Antarctica and secured by several islands, essentially an iceberg so thick that it rests on the bottom and extends a kilometer or more above sea level. If it should glacially or otherwise move to sea it would sink and raise sea level drastically. (Floating ice, like the Arctic sea ice, does not affect sea level; the grounded ice would.) The estimate of potential sea-level rise is on the order of twenty feet. That would put major coastal cities, like New York or London, under water. They might be preserved with dikes—Amsterdam is about fourteen feet below sea level—but huge areas of nations like Bangladesh could not be protected. (Not only would the coastline of Bangladesh be prohibitively long to protect with levees but there would be no way for fresh water—already a source of severe flooding—to reach

the sea.)

These are two phenomena that will need watching and study. Either, by the time it manifests itself, may be beyond prevention: the warming built into the system of greenhouse gases, delayed by the "thermal inertia" of the oceans—their capacity to delay the actual warming of the atmosphere—may be sufficient to continue the process.

* * * *

An interesting policy option, probably only for the far future, gets remarkably little attention, possibly because it sounds too much like science fiction, possibly because it scares people who do not want it discussed. It has attracted the name "geo-engineering"—changing something about the earth. (Actually, with global warming, we are already geo-engineering, just not purposely.) The specific proposal would be to increase the earth's albedo, its reflection of incoming sunlight. It is now known, and somewhat measurable, that aerosols—fine solid or liquid particles in the atmosphere, especially those of sulfur—reflect sunlight. Volcano eruptions that put lots of sulfur in the atmosphere have had this effect famously. Today's pollution, especially industrial but also windblown dust and sand, is thought to be reflecting enough sunlight to mask somewhat the greenhouse effect.

Why not do this purposefully one may ask? If we are putting things in the atmosphere, the various greenhouse gases that absorb outgoing radiation, why not put things in the atmosphere that reflect incoming radiation—just "preserve the balance?" We could not use sulfur, it is too unhealthful to people and wildlife. Instead, we could spend a few decades experimenting to find something cheap and innocuous that may stay in the stratosphere long enough to be a partial solution to the greenhouse problem. The amount of incoming sunlight that would have to be kept out is small enough to be not noticeable. A report of the National Academy of Sciences mentioned the possibility a dozen years ago.

The idea has some attractions. It reduces the need to change the way people all over the world cook their meals, drive their cars, light and cool and warm their homes, grow their rice—rice paddies are a source of methane, a greenhouse gas—and produce their electricity. Instead of negotiating a complex regime of emission quotas, nations would negotiate shares in the costs of the program, a kind of negotiation with which they have had experience at least since the first U. N. budget. Diplomatically and administratively, it would drastically simplify the greenhouse issue. But for the time being this possibility is not visible on anybody's agenda. It certainly deserves research into the possibilities for small-scale reversible experiments in case the greenhouse problem begins to appear diplomatically intractable some time in the decades to come.

* * * *

What should be the role of developing countries, especially the major ones—China, India, Indonesia, Brazil, South Korea—but also more than a hundred others, some of them oil-exporting members of OPEC? The U.S. Senate

overwhelmingly passed a resolution, in relation to the Kyoto treaty, calling for the full participation of the main developing countries in any treaty that the United States might join. Perhaps for some senators the resolution was a gentle way of disposing of the treaty. The developing nations were on record, unambiguously, as having no intention of participating. (A hundred of them actually ratified the Kyoto treaty, but their participation was ceremonial; the treaty excluded them from any obligation.)

Certainly the larger developing nations must eventually be brought into some form of cooperation to reduce emissions. China's emissions of carbon dioxide are already one-half the United States' and growing at a rate to surpass U.S. emissions in another two or three decades. Two motives make them uneager to join. A main motive is their correct perception that rapid development will reduce their vulnerability to climate, and suppressing energy use is likely to hinder development. Another is that the developed nations, especially the United States, having developed industrially through uninhibited exploitation of fossil fuels over the past century and a half, and less in need of rapid further development to escape the dangers of climate change, should lead the way and demonstrate a serious commitment to emissions reduction. They probably do not yet perceive such leadership or commitment.

If Western Europe, Japan, and the United States manage to demonstrate over the coming decade that they are serious about the climate issue, China, India, and others can probably be induced to take the subject seriously. At that time the wealthy nations can engage in planning how to help the developing world afford to join a global effort.

CONSERVING THE WORLD'S FORESTS: ARE PROTECTED AREAS THE ONLY WAY?

TANYA HAYES*
ELINOR OSTROM**

"[W]e know less about what brings deforestation under control, except that experience suggests the need for strong government institutions to implement stated policies and resist elite groups who have traditionally pursued the exploitation of the forest."¹

"No long-term management strategy is effective without the involvement of all stakeholders, particularly those who live in the immediately adjacent areas."²

I. WHY PROTECTED AREAS?

In 1992, the Earth Summit in Rio de Janeiro highlighted the environmental destruction occurring in the world and the need to protect biodiversity hotspots. Following on the tail of the Brundtland Commission report,³ the Earth Summit called for sustainable development and greater protection of valuable ecosystems. Set in Brazil, the Earth Summit also drew attention to the plight of the world's forests as images of the Amazon aflame awakened many to the threats of rampant deforestation. As a result, 150 government leaders signed the Convention on Biological Diversity (CBD) that emerged as a major outcome of the Rio meeting.⁴ As part of the CBD, the participating governments agreed to "[e]stablish a system of protected areas or areas where special measures need to be taken to conserve biological diversity."⁵ In the same year, participants in the Fourth World Congress on National Parks and Protected Areas agreed to

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1. MICHAEL WILLIAMS, *DEFORESTING THE EARTH: FROM PREHISTORY TO GLOBAL CRISIS* 498 (2003).

2. Anthony R. E. Sinclair & Brian H. Walker, *Foreword* to *THE KRUGER EXPERIENCE: ECOLOGY AND MANAGEMENT OF SAVANNA HETEROGENEITY* xiii, xv (Johan T. du Toit et al. eds., 2003).

3. *OUR COMMON FUTURE: THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT* (Gro Harlem Brundtland ed., 1987).

4. Convention on Biological Diversity, *opened for signature* May 22, 1992, 1760 U.N.T.S. 79.

5. *Id.* art. 8a.

designate a minimum of 10% of each biome under their jurisdiction (oceans, forests, tundra, wetlands, grasslands) as protected areas.⁶

The establishment of protected areas to protect forest lands is largely based on a belief that government jurisdiction over forests with defined restricted uses is necessary for sustained conservation.⁷ The desire to protect large territories so habitats can be connected at a large spatial scale is also a scientific reason often given as a foundation for the creation of protected areas.⁸ Many of the larger reserves include a multiplicity of governance types with international donor funding used to initiate planning at a regional scale. While there is validity to the argument that preserving habitat for some species should be done at a large spatial scale, the preference articulated by many conservationists for government protection does not have as strong a foundation.

Managing protected areas has been seen by many as the preeminent method for protecting forests, wildlife, and wilderness in general.⁹ Today, more than 100,000 protected areas have been launched and officially encompass roughly 10% of the world's forests.¹⁰ During the last half century, developing countries greatly expanded the extent of their land designated as protected areas.¹¹ In many instances, however, the designation of a protected area on a map generated substantial donor funding, but not the creation of effective protected areas on the ground.¹² Donor projects have tended "to invest heavily in extensive background studies and elaborate plans made by outside experts, generating reports that too often are rarely used, culturally irrelevant, and quickly obsolete."¹³

6. Krishna B. Ghimire & Michel P. Pimbert, *Social Change and Conservation: an Overview of Issues and Concepts*, in *SOCIAL CHANGE AND CONSERVATION: ENVIRONMENTAL POLITICS AND IMPACTS OF NATIONAL PARKS AND PROTECTED AREAS* 1, 11 (Krishna B. Ghimire & Michel P. Pimbert eds., 1997) [hereinafter *SOCIAL CHANGE AND CONSERVATION*].

7. AUGUSTA MOLNAR ET AL., *FOREST TRENDS & ECOAGRICULTURAL PARTNERS, WHO CONSERVES THE WORLD'S FORESTS? COMMUNITY-DRIVEN STRATEGIES TO PROTECT FORESTS & RESPECT RIGHTS* (2004).

8. Mark W. Schwartz, *Choosing the Appropriate Scale of Reserves for Conservation*, 30 *ANN. REV. ECOLOGY & SYSTEMATICS* 83 (1999).

9. NATIONAL PARKS, CONSERVATION, AND DEVELOPMENT: THE ROLE OF PROTECTED AREAS IN SUSTAINING SOCIETY (Jeffrey A. McNeely & Kenton R. Miller eds., 1984); P. H. C. LUCAS, *PROTECTED LANDSCAPES: A GUIDE FOR POLICY-MAKERS AND PLANNERS* (1992).

10. 2003 UNITED NATIONS LIST OF PROTECT AREAS vii (Stuart Chape et al., compilers, 2003), available at http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/protected_areas/UN_list/~main.

11. Michael J. B. Green & James Paine, *State of the World's Protected Areas at the End of the Twentieth Century*, Paper presented at IUCN World Commission on Protected Areas Symposium on *Protected Areas in the 21st Century: From Islands to Networks*, Albany, Australia (Nov. 24–29, 1997).

12. Kevin Bishop et al., *Protected For Ever? Factors Shaping the Future of Protected Areas Policy*, 12 *LAND USE POL'Y* 291 (1995).

13. Jeffrey Sayer & Michael P. Wells, *The Pathology of Projects*, in *GETTING BIODIVERSITY PROJECTS TO WORK: TOWARDS MORE EFFECTIVE CONSERVATION AND DEVELOPMENT* 35, 39 (Thomas O. McShane & Michael P. Wells eds., 2004) [hereinafter *GETTING BIODIVERSITY*].

Some conservationists continue to call for an increase in the area of forests under strict reserve management.¹⁴ However, we actually do not know how well protected areas conserve the lands, so how can we in good conscience extend this system to the rest of the world's forests?¹⁵ Considerable debate exists regarding the general causes of loss of biodiversity or the massive levels of deforestation that are occurring.¹⁶ Many cases of government weaknesses in managing natural resources have been documented.¹⁷

In 1999, the World Conservation Union reported on the effectiveness of forest protected areas and concluded that protected areas continue to face threats from human pressures and legal designation does not ensure sustained conservation. The survey that the International Union for Conservation of Nature and Natural Resources (IUCN) conducted of protected areas in 10 key forested countries found only 1% of these protected areas were secure from threat.¹⁸ The IUCN further noted that many protected areas lack financial and human resources, a supportive legal framework, and the institutional infrastructure necessary to regulate agriculture, grazing, forestry, mining, hunting, civil conflict, and tourism.¹⁹

A recent study conducted by WWF International of more than 200 protected areas in 37 countries found similar results.²⁰ While protected areas in these

PROJECTS TO WORK].

14. RICHARD E. RICE ET AL., *SUSTAINABLE FOREST MANAGEMENT: A REVIEW OF CONVENTIONAL WISDOM* (2001); WORLD WILDLIFE FEDERATION, *ARE PROTECTED AREAS WORKING? AN ANALYSIS OF FOREST PROTECTED AREAS BY WWF* (2004) [hereinafter WWF], available at [http://www.panda.org/downloads/forests/areprotectedareas working.pdf](http://www.panda.org/downloads/forests/areprotectedareas%20working.pdf); Francis E. Putz et al., *Tropical Forest Management and Conservation of Biodiversity: An Overview*, 15 CONSERVATION BIOLOGY 7 (2001); Richard E. Rice et al., *Can Sustainable Management Save Tropical Forests*, 276 SCI. AM. 44 (1997).

15. JOHN F. OATES, *MYTH AND REALITY IN THE RAIN FOREST: HOW CONSERVATION STRATEGIES ARE FAILING IN WEST AFRICA* (1999).

16. ANUP SHAH, *THE ECONOMICS OF THIRD WORLD NATIONAL PARKS: ISSUES OF TOURISM AND ENVIRONMENTAL MANAGEMENT* (1995); Robert T. Deacon, *Assessing the Relationship between Government Policy and Deforestation*, 28 J. ENVTL. ECON. & MGMT. 1 (1995); Robert T. Deacon, *Deforestation and the Rule of Law in a Cross-Section of Countries*, 70 LAND ECON. 414 (1994); Claudia Romero & Germán I. Andrade, *International Conservation Organizations and the Fate of Local Tropical Forest Conservation Initiatives*, 18 CONSERV BIOL 578 (2004); Michael Wells, *Biodiversity Conservation, Affluence and Poverty: Mismatched Costs and Benefits and Efforts to Remedy Them*, 21 AMBIO: J. HUM. ENV'T 237 (1992).

17. WILLIAM ASCHER, *WHY GOVERNMENTS WASTE NATURAL RESOURCES: POLICY FAILURES IN DEVELOPING COUNTRIES* (1999); PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW (Terry L. Anderson & Fred S. McChesney eds., 2003).

18. INT'L UNION FOR CONSERVATION OF NATURE AND NATURAL RES., *THREATS TO FOREST PROTECTED AREAS: SUMMARY OF A SURVEY OF 10 COUNTRIES CARRIED OUT IN ASSOCIATION WITH THE WORLD COMMISSION ON PROTECTED AREAS 2* (1999) [hereinafter IUCN].

19. *Id.*; see also *PARKS IN PERIL: PEOPLE, POLITICS, AND PROTECTED AREAS* (Katrina Brandon et al. eds., 1998).

20. WWF, *supra* note 14.

countries are legally well established and many of the boundaries are demarcated, these formal arrangements are not sufficient to protect an area by themselves. Among the weaknesses identified by survey respondents was the effectiveness of their own protection systems.²¹ Thus, they frequently failed to monitor and enforce the reserve regulations. Protected areas also consistently failed to engage in positive relations with the local residents and with indigenous peoples.²² WWF found that four key threats endanger forest protected areas: poaching, encroachment, logging, and gathering of non-timber forest products.²³ The report also found that effectiveness of protected areas varied by region. Protected areas in Europe, for example, scored significantly higher on management effectiveness than protected areas in Latin America.

The poor results for protected areas in Latin America are environmentally important, because 60% of the world's tropical forests lie in this region.²⁴ Furthermore, according to Michael Jenkins, president of Forest Trends, and his colleagues, approximately 90% of the world's forests remain outside protected area systems.²⁵ Should the first priority be to place these forests within protected areas? Or, are there other options that should be considered? Due to the many problems encountered by protected areas that exclude local residents from any formal role in relationship to the designated areas, many analysts, donors, and environmental groups have successfully urged the creation of integrated conservation and development projects that have dual responsibilities: to protect biodiversity and to enhance the economic development of people living around a protected area. While some of these projects have succeeded in achieving aspects of both goals, many have been based on unrealistic assumptions.²⁶ In this Article, we present a more nuanced discussion of the advantages and disadvantages of protected areas as well as summarize several carefully designed empirical studies that cumulatively suggest that protected areas are not always necessary, and are by no means, the *only* way to conserve forests. Nor are there any other panaceas guaranteed to protect forests against loss of biodiversity, extent, or sustainability. There are, however, some successful alternatives to protected areas as well as some successful protected areas.

II. WHY LOOK ELSEWHERE?

As both the IUCN and WWF reports conclude, protected areas struggle to monitor and enforce forest regulations adequately. In addition, one of the

21. *Id.* at 8.

22. *Id.*

23. *Id.* at 11.

24. SOCIAL CHANGE AND CONSERVATION, *supra* note 6, at 5.

25. Michael Jenkins et al., *Markets for Biodiversity Services: Potential Roles and Challenges*, ENV'T, July-Aug. 2004, at 32, 34.

26. GETTING BIODIVERSITY PROJECTS TO WORK, *supra* note 13 (an excellent overview of the puzzles and challenges of trying to accomplish both of these goals); John G. Robinson & Kent H. Redford, *Jack of All Trades, Master of None: Inherent Contradictions among ICD Approaches*, in GETTING BIODIVERSITY PROJECTS TO WORK, *supra* note 13, at 10.

greatest challenges for protected area personnel is working with local communities to mediate human pressures on ecological resources. Managing protected areas is particularly difficult when active local resistance to protected area policies is present and the protected areas have limited financial and human resources.

Unfortunately, through much of history, decisions to create government-protected areas have often been made by conservationists or colonial powers with little thought about the rights, cultural traditions, and livelihood needs of the local residents living in the ecological regions.²⁷ Today, many advocates continue to promote the use of protected areas irrespective of local livelihood needs, declaring that biodiversity protection is a moral imperative that can only be adequately protected through strict government regulations and that sustainable development and ecologically friendly communities are mere myths—at least in the naïve way that many integrated conservation and development programs have been funded.²⁸

Inattention to the political and economic costs of protected areas, however, leads some advocates to believe that simply declaring a territory to be a protected area is sufficient for all conservation needs and ignores the challenges many of these areas face. The costs of enforcing laws that are not perceived to be legitimate by those expected to comply with the laws has repeatedly been found to be excessive. The problem of hiring guards or police, paying them well, imposing costly sanctions on those caught breaking the law, trying to ensure that guards do not use opportunities to collect bribes, and coping with widespread dissatisfaction with what is conceived as illegitimate imposition of formal laws is a general problem.²⁹ It is not restricted only to the protection of forests.

In her study of rates of compliance by taxpayers with government-imposed taxes, for example, Margaret Levi uses the concept of “quasi-voluntary compliance” to explain why in some countries citizens do comply with taxes at very high levels. Paying taxes in these systems is “voluntary” in the sense that many citizens choose to comply in situations where they are not being directly observed and coerced. It is not entirely voluntary, however. It is only *quasi-*

27. SUSANNA HECHT & ALEXANDER COCKBURN, *THE FATE OF THE FOREST: DEVELOPERS, DESTROYERS AND DEFENDERS OF THE AMAZON* (1990); RODERICK P. NEUMANN, *IMPOSING WILDERNESS: STRUGGLES OVER LIVELIHOOD AND NATURE PRESERVATION IN AFRICA* (1998); *SOCIAL CHANGE AND CONSERVATION*, *supra* note 6; Peter R. Wilshusen et al., *Reinventing a Square Wheel: Critique of a Resurgent “Protection Paradigm” in International Biodiversity Conservation*, 15 *SOC’Y & NAT. RESOURCES* 17 (2002).

28. JOHN TERBORGH, *REQUIEM FOR NATURE* (1999); Kent H. Redford & Allyn Maclean Stearman, *Forest-Dwelling Native Amazonians and the Conservation of Biodiversity: Interests in Common or in Collision?*, 7 *CONSERVATION BIOLOGY* 248 (1993); Wilshusen et al., *supra* note 27.

29. JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* (1989); JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998); ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION, AND WELFARE* (1986); Antonio Azuela, *Illegal Logging and Local Democracy: Between Communitarianism and Legal Fetishism*, 19 *J. SUSTAINABLE FORESTRY* 81 (2004).

voluntary since "the noncompliant are subject to coercion—if they are caught."³⁰ It is possible to achieve a general strategy of quasi-voluntary compliance where citizens have confidence that "(1) rulers will keep their bargains and (2) the other constituents will keep theirs. Taxpayers are strategic actors who will cooperate only when they can expect others to cooperate as well. The compliance of each depends on the compliance of the others."³¹ Understanding these conditions is crucial for those interested in protecting forests and other natural resources.

When protected areas are declared in some distant capital by officials who fail to consider or inform local populations, residents of the reserve may not even know a protected area exists. Furthermore, even when locals are informed of the protected status, those who have relied on the resources for their own livelihoods for long periods of time, or perceive it to be their right to exploit the natural resource system, may continue their old practices and engage in violent protests when officials are sent to enforce a law that is not perceived locally as legitimate and is not consistently enforced.

When residents do not believe that the government has the right to regulate their resource use, they will often find ways to resist or sabotage park regulations. Conflict between park residents and park personnel is well-documented and a consistent theme³² in discussions about protected areas.³³ Examples of places where conflict exists between residents and park personnel include Khoa Yai in Thailand, where local residents resisted protected area policies implemented by the Royal Forestry Department and fighting resulted in the deaths of local residents and park personnel.³⁴ In Eastern Africa, the Maasai have protested protected area regulations that eliminated key watering spots and disrupted their traditional cattle herding patterns.³⁵ Similarly, in Costa Rica, park policies in certain regions have enraged local residents who feel that the park administration is impinging on local livelihoods.³⁶ And, in the Rio Plátano Biosphere Reserve in Honduras, as in other contested protected areas, park

30. MARGARET LEVI, *OF RULE AND REVENUE* 52 (1988).

31. *Id.* at 53.

32. World Conservation Union, *World Parks Congress Workshops* (Sept. 8-17, 2003), *Building Broader Support For Protected Areas*, at <http://www.iucn.org/themes/wcpa/wpc2003/english/programme/workshops/broader.htm>.

33. *MANAGING CONFLICTS IN PROTECTED AREAS* (Connie Lewis ed., 1996); MOLNAR ET AL., *supra* note 7; MICHAEL WELLS & KATRINA BRANDON, *PEOPLE AND PARKS: LINKING PROTECTED AREA MANAGEMENT WITH LOCAL COMMUNITIES* (1992); DAVID WESTERN, *IN THE DUST OF KILIMANJARO* (1997).

34. WELLS & BRANDON, *supra* note 33, at 10.

35. JIM IGOE, *CONSERVATION AND GLOBALIZATION: A STUDY OF NATIONAL PARKS AND INDIGENOUS COMMUNITIES FROM EAST AFRICA TO SOUTH DAKOTA* (2004); WESTERN, *supra* note 33.

36. WELLS & BRANDON, *supra* note 33; Craig MacFarland et al., *Establishment, Planning and Implementation of a National Wildlands System in Costa Rica*, in *NATIONAL PARKS, CONSERVATION, AND DEVELOPMENT: THE ROLE OF PROTECTED AREAS IN SUSTAINING SOCIETY* 592 (Jeffrey A. McNeely & Kenton R. Miller eds., 1984).

guards frequently receive death threats and active resistance to park regulations.³⁷

Protected areas in general, and contested protected areas in particular, are economically costly to monitor and enforce. Costs to manage protected areas are increasing as current global trends indicate that public expenditure and international financing are flat or declining.³⁸ The conservation community estimates that an additional U.S. \$27 to \$30 billion is needed annually to adequately manage protected areas.³⁹ This is particularly troubling for developing countries. The WWF report finds that adequate funds are correlated with effective protected area management. It also finds that many developing countries lack these funds. For example, the average budget per protected forest area in Europe is eight times that in Latin America.⁴⁰

In recent years, more attention has been given to including greater local participation in protected areas in order to reduce conflict, support traditional conservation practices, and decrease monitoring and enforcement costs.⁴¹ This is consistent with a broadening of the concept of property rights themselves.⁴² Adrian Phillips, former chair of the World Commission of Protected Areas, stated that the crucial lesson in protected area management is "the iron rule that no protected area can succeed for long in the teeth of local opposition."⁴³ But, many protected area planners and administrators are still unable to enact participatory policies that are legitimate in the eyes of the residents.⁴⁴ As the WWF report found, many protected areas continue to struggle in their relations with local residents.

A significant gap in the analysis of forest protection is attention to other institutional mechanisms for conservation. A survey of forest management by Molnar and colleagues finds that a minimum of 370 million hectares of global forest lands are under community conservation.⁴⁵ Their work and the work of others demonstrate that public ownership is not the only institutional

37. TANYA M. HAYES, COLLABORATIVE MANAGEMENT: AN INSTITUTIONAL ANALYSIS OF COMMUNITY-STATE COOPERATION TO CONSERVE THE RIO PLÁTANO BIOSPHERE RESERVE, HONDURAS (Ctr. for the Study of Institutions, Population, and Env'tl. Change, Working Paper No. CWP-04-03, 2004); David J. Dodds, *Lobster in the Rain Forest: The Political Ecology of Miskito Wage Labor and Agricultural Deforestation*, 5 J. POL. ECOLOGY 83 (1998).

38. MOLNAR ET AL., *supra* note 7.

39. *Id.*

40. WWF, *supra* note 14, at 25.

41. Grazia Borrini-Feyerabend, *Indigenous and Local Communities and Protected Areas: Rethinking the Relationship*, 12 PARKS, No. 2, at 5 (2002), available at <http://iucn.org/themes/wcpa/pubs/pdfs/PARKS/parks12.2.pdf>; Sejal Worah, *The Challenge of Community-Based Protected Area Management*, 12 PARKS, No. 2, at 80 (2002).

42. Daniel H. Cole & Peter Z. Grossman, *The Meaning of Property Rights: Law Versus Economics?*, 78 LAND ECON. 317 (2002).

43. Borrini-Feyerabend, *supra* note 41, at 11.

44. PATRICIA S. LARSON ET AL., WWF INTEGRATED CONSERVATION AND DEVELOPMENT PROJECTS: TEN LESSONS FROM THE FIELD 1985–1996 (1998); WELLS & BRANDON, *supra* note 33; Worah, *supra* note 41.

45. MOLNAR ET AL., *supra* note 7, at 3.

arrangement that may be associated with environmental conservation.⁴⁶ The number of forests lying outside protected areas also demonstrates the need to understand what conditions have promoted their protection and thwarted their destruction. The Forest Trends study concludes that secure tenure rights, institutional and regulatory support for community institutions, fair access to markets, direct finance to local communities, and engagement of local communities in conservation research all appear to increase the probability of successful community forest conservation.⁴⁷ The findings suggest the importance of considering conservation prospects outside of legally designated protected areas.

III. CONTINUED RELIANCE ON PROTECTED AREAS: THE NEED TO CONSIDER ALTERNATIVES

Despite the apparent importance of local communities in forest conservation, many conservationists are reluctant to step outside the confines of the protected area model and explore alternative institutional arrangements for forest management.⁴⁸ For example, in their study published in *Science* on the *Effectiveness of Parks in Protecting Tropical Biodiversity*, Aaron Bruner and colleagues examine the ability of parks to mediate anthropogenic threats.⁴⁹ In the introduction to their article they reflect on the growing criticism of parks and the greater promotion of sustainable forest management and community conservation, and note the lack of empirical research that has tested how parks measure up to alternative institutional arrangements. Regrettably, Bruner and colleagues fail to compare parks to these alternatives. Instead they base their findings on a survey of park officials about the conditions inside their own parks and within a ten-kilometer boundary outside the parks. The authors find that protected areas are effective, particularly when parks are actively monitored and enforced by official guards. Relying on park officials alone to judge the effectiveness of their own park is, however, subject to considerable methodological concerns.⁵⁰ Based on these questionnaire responses, Bruner and colleagues conclude that central, law-defined, strictly protected area systems enforced by public officials are necessary. Unfortunately, they fail to consider

46. See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); THE EQUITABLE FOREST: DIVERSITY, COMMUNITY, AND RESOURCE MANAGEMENT (Carol J. Pierce Colfer ed., 2005); Thomas Dietz et al., *The Drama of the Commons*, in THE DRAMA OF THE COMMONS 1, 3 (Elinor Ostrom et al. eds., National Research Council, 2002) [hereinafter THE DRAMA OF THE COMMONS]; Thomas Dietz et al., *The Struggle to Govern the Commons*, 302 SCI. 1907 (2003) [hereinafter Dietz et al., *The Struggle to Govern the Commons*]; Clark C. Gibson et al., *Explaining Deforestation: The Role of Local Institutions*, in PEOPLE AND FORESTS: COMMUNITIES, INSTITUTIONS, AND GOVERNANCE 1 (Clark C. Gibson et al. eds., 2000).

47. MOLNAR ET AL., *supra* note 7, at 20.

48. See, e.g., TERBORGH, *supra* note 28; Aaron G. Bruner et al., *Effectiveness of Parks in Protecting Tropical Biodiversity*, 291 SCI. 125 (2001).

49. Bruner et al., *supra* note 48.

50. See IUCN, *supra* note 18.

the effectiveness of alternative conservation strategies.

The principal arguments given for protected areas as the only way to conserve forests are that (1) the only way to maintain forest cover is the establishment of defined areas that are owned and regulated by a national government for the purpose of preservation; (2) resource users are unable to create and enforce appropriate resource management rules; and hence (3) substantial investment in top-down enforcement is essential to achieve adequate environmental protection. Results from studies on forest management, however, suggest that these three arguments are myths that do not hold when tested with empirical evidence.

A. Empirical Studies of Diverse Forest Institutions

To examine these myths, we draw on multiple studies that colleagues associated with the Center for the Study of Institutions, Population, and Environmental Change (CIPEC) and the Workshop in Political Theory and Policy Analysis, both at Indiana University, have conducted as a result of their collaboration with an international network of scholars interested in understanding how institutions interact with biophysical and behavioral factors to influence land use and land-use change—particularly forested land. In these studies, we have measured forest conditions using multiple measures. In this Article, we report primarily on the stability of forest cover and the abundance of vegetation density. Before turning to the empirical results, however, let us briefly discuss some of the methods that we have used.

B. International Forestry Resources and Institutions Field Protocols

The International Forestry Resources and Institutions (IFRI) research and training program was initiated as a result of a request in 1992 from Dr. Marilyn Hoskins, who headed the Forestry, Trees, and People Program at the Food and Agricultural Organization (FAO) of the United Nations. Many policies were under discussion at FAO related to the best legal structure to develop and to enhance forest preservation. Dr. Hoskins asked us to develop a reliable methodology that could be implemented by research teams in developing countries working together as a network to explore the effectiveness of protected areas, community forests, and diverse types of government forests by conducting well-designed empirical studies in multiple regions of the world. FAO was aware of our work on irrigation and other resource institutions and hoped that the theoretical foundations of that work could be applied to the study of forestry institutions.⁵¹

Our research team spent two years developing a series of ten protocols that

51. See IMPROVING IRRIGATION GOVERNANCE AND MANAGEMENT IN NEPAL (Ganesh P. Shivakoti & Elinor Ostrom eds., 2002); WAI FUNG LAM, GOVERNING IRRIGATION SYSTEMS IN NEPAL: INSTITUTIONS, INFRASTRUCTURE, AND COLLECTIVE ACTION (1998); ELINOR OSTROM, CRAFTING INSTITUTIONS FOR SELF-GOVERNING IRRIGATION SYSTEMS (1992); OSTROM, *supra* note 46; SHUI YAN TANG, INSTITUTIONS AND COLLECTIVE ACTION: SELF-GOVERNANCE IN IRRIGATION (1992).

would enable us to obtain reliable information on the ecological condition of the forests to be studied and good information about how institutions related to forest governance were devised and monitored, and whether or not they were successful in the field. In the process of designing our protocols, we involved the advice and input from more than 100 researchers and policymakers located in all regions of the world. We consulted officials who were implementing National Environmental Action Plans to ascertain the types of information they needed for future policy. We worked with several forest departments to add measures that were of importance to them. We sought the help of researchers who have a major interest in questions of biodiversity and forest sustainability as well as the impact of institutional arrangements.

The core set of ten protocols that resulted from this wide consultation process is designed to enable scholars to examine the impact of diverse ways of owning and governing forests (such as individual ownership, joint ownership by a community, and different forms of government ownership) on investment, harvesting, protection, and managing activities and their consequences on forest conditions, including biodiversity.⁵² We have developed a large relational database that is used to record structured and qualitative data in a consistent manner across sites. The core protocols are designed so that additional questions can be addressed in specific studies designed by collaborating researchers by adding a specific set of questions to one of the existing protocols, or by adding a new protocol such as a household survey.

A long-term collaborative research network has now been established with centers located in Bolivia, Colombia, Guatemala, India, Kenya, Mexico, Nepal, Tanzania, Thailand, Uganda, and our own center in Bloomington, Indiana. Research using the IFRI protocols has also been conducted in Brazil, Mali, and Madagascar. Together, colleagues in the network have collected data in more than 200 sites and revisited 41 of them at least one time. As of December 1, 2004, we have taken a random sample of 8695 forest plots and actually measured 127,712 trees (including diameter, height, and species). This has involved a very large effort to devise appropriate sampling plans, locate the sample plots in forests, and measure the trees, shrubs, and groundcover in the plots with regard to ecological measurements. We also conduct in-depth individual and group interviews with members of user groups, organize discussions with local public officials, draw on archival records when available, develop accurate maps, enter the collected data into the database, and write initial site reports to be given back to the communities where we have conducted our studies.

The studies reported here draw upon forest rules, monitoring activities, and rule-making rights as recorded in the IFRI database. In addition to the diverse forest mensurations taken in each forest, assessments are made by an independent forester and by forest users on several key variables related to vegetation. An independent forester or ecologist is asked to rank the vegetation density of the study forest in comparison to other forests in the same ecological zone. The

52. Ctr. for the Study of Institutions, Population, and Envtl. Change, Indiana University, International Forestry Resources and Institutions Research Program Field Manual (Aug. 2004, ver. 12).

vegetation density in the forest under study is ranked on a five-point scale from very sparse to very abundant. Similarly, the forest users are asked to rank forest condition from very sparse to very abundant. These qualitative assessments provide a measure of forest cover that can be used to compare forests across ecological zones. In the studies discussed below, we specify whether the forester's assessment and/or the community assessment is used to determine forest vegetation density.

C. Analysis of Changes in Forest Cover Reflected in Over-Time Satellite Images

CIPEC researchers also have actively used remotely sensed data in many of our research efforts.⁵³ The analysis of several remotely sensed images over a decade or more is a particularly useful technique for examining the impact of institutional arrangements, as we illustrate below. In our discussion of Myth 1 below we present a multi-temporal composite of the Maya Biosphere Reserve in northern Guatemala developed by Edwin Castellanos, Glen Green, and Victor Hugo Ramos. A composite is constructed by overlaying satellite images of a site taken on three different dates covering two sequential time periods. The original composite uses colors to represent stages of clearance and regrowth. When converted to a black-and-white image, the areas that were stable throughout the relevant time period are uniformly dark. Areas that have experienced substantial forest conversion are light grey and white. A color composite of the Maya Biosphere Reserve and color composites from Madagascar, Uganda, Brazil, and Nepal are analyzed in the Supporting Online Material to Dietz, Stern, and Ostrom's article in *Science*.⁵⁴

IV. FINDINGS: CHALLENGING THREE MYTHS OF FOREST PROTECTION

Findings by CIPEC researchers challenge the beliefs that protected areas are the only way to protect forest lands and that resource users are unable to enforce or create forest management rules. Deforestation is driven by a complex web of factors acting at local, national, and global scales. Demographic, economic, technological, institutional, cultural, and sociopolitical forces all interact with

53. EMILIO F. MORAN & ELINOR OSTROM, SEEING THE FOREST AND THE TREES, HUMAN-ENVIRONMENT INTERACTIONS IN FOREST ECOSYSTEMS (forthcoming July 2005); Dengsheng Lu et al., *Relationships between Forest Stand Parameters and Landsat TM Spectral Responses in the Brazilian Amazon Basin*, 198 FOREST ECOLOGY & MGMT. 149 (2004); Harini Nagendra et al., *Accessibility as a Determinant of Landscape Transformation in Western Honduras: Linking Pattern and Process*, 18 LANDSCAPE ECOLOGY 141 (2003); Harini Nagendra, *Tenure and Forest Conditions: Community Forestry in the Nepal Terai*, 29 ENVTL. CONSERVATION 530 (2002); Charles M. Schweik et al., *Using Satellite Imagery to Locate Innovative Forest Management Practices in Nepal*, 32 AMBIO: J. HUM. ENV'T 312 (2003); Jane Southworth et al., *Assessing the Impact of Celaque National Park on Forest Fragmentation in Western Honduras*, 24 APPLIED GEOGRAPHY 303 (2004).

54. Dietz et al., *The Struggle to Govern the Commons*, *supra* note 46.

biophysical features of the land to produce patterns of deforestation.⁵⁵ Empirical studies of forest management demonstrate that while in certain conditions protected area policies are effective in controlling deforestation, they are not foolproof solutions to resolve all of the complex factors driving deforestation. The following CIPEC findings counter three myths about forest protection that are pervasive in the conservation community.

A. Myth 1: Only Legally Designated Protected Areas Will Maintain Forest Cover

The protected area model is based on the assumption that conservation requires government ownership and regulation.⁵⁶ In order to test whether government ownership and protected area regulations are necessary for forest protection, Hayes compared forest vegetation density in 76 legally designated, government-owned protected areas to forest vegetation density in 87 forests that are not legally designated as protected areas.⁵⁷ The data about these forests are contained in the IFRI database. The findings demonstrate that both legally defined, government-owned protected areas (which we refer to as “parks”) and other types of institutions (“non-parks”) that include forests managed by private owners, local forest users, or national government agencies are capable of conserving forests.

Figure 1 shows the results from the cross-national comparison of forest vegetation density in IFRI forests that are parks contrasted with IFRI forests that are non-parks. All of the parks in the sample are government-owned protected areas. Non-parks include public, private, and communally owned forested lands used for a variety of purposes. Forest vegetation density is the ranking assigned to the forest by the forester or ecologist who participated in the measurement of trees, shrubs, and groundcover in a randomly selected set of forest plots after the completion of forest mensuration. As mentioned above, the assigned ranking is a five-point scale from very sparse to very abundant.⁵⁸

55. IUCN, *supra* note 18; HECHT & COCKBURN, *supra* note 27; MORAN & OSTROM, *supra* note 53; SUSAN C. STONICH, “I AM DESTROYING THE LAND”: THE POLITICAL ECOLOGY OF POVERTY AND ENVIRONMENTAL DESTRUCTION IN HONDURAS (1993); Helmut J. Geist & Eric F. Lambin, *What Drives Tropical Deforestation?*, LUCC REPORT NO. 4 (2001); Eric F. Lambin et al., *The Causes of Land-Use and Land-Cover Change: Moving Beyond the Myths*, 11 GLOBAL ENVTL. CHANGE 261 (2001); Emilio F. Moran et al., *Household Demographic Structure and its Relationship to Deforestation in the Amazon Basin*, in PEOPLE AND THE ENVIRONMENT: APPROACHES FOR LINKING HOUSEHOLD AND COMMUNITY SURVEYS TO REMOTE SENSING AND GIS 61 (Jefferson Fox et al. eds., 2003); Emilio F. Moran et al., *Strategies for Amazonian Forest Restoration: Evidence for Afforestation in Five Regions of the Brazilian Amazon*, in AMAZÔNIA AT THE CROSSROADS: THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 129 (Anthony Hall ed., 2000).

56. MOLNAR ET AL., *supra* note 7; SOCIAL CHANGE AND CONSERVATION, *supra* note 6.

57. TANYA M. HAYES, PARKS, PEOPLE, AND FOREST PROTECTION: AN INSTITUTIONAL ASSESSMENT OF THE EFFECTIVENESS OF PROTECTED AREAS (Ctr. for the Study of Institutions, Population, and Env'tl. Change, Working Paper No. CWP-04-01, 2004).

58. When forests are located within the same ecological zone, we use the extensive data

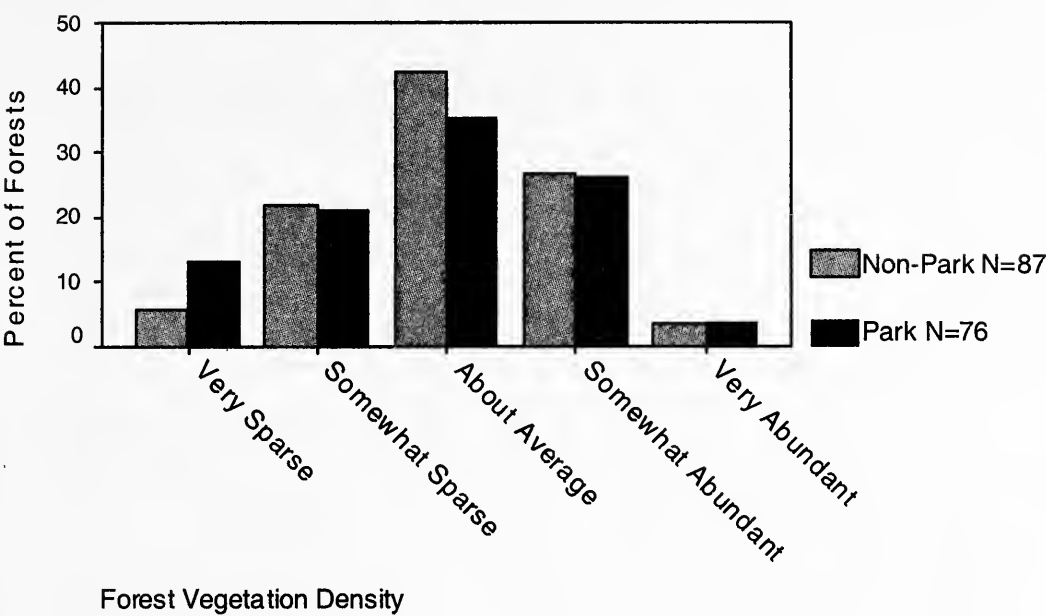


Figure 1. Comparison of Vegetation Density in Parks and Non-Parks. The Kolmogorov-Smirnov Z score is 0.472; the asymptotic significance (2-tailed) value is 0.979.⁵⁹

A Kolmogorov-Smirnov test compares the distributions of forest vegetation density in the two datasets and can be used to determine if the two distributions differ significantly. The Kolmogorov-Smirnov Z score is 0.472, and the p value for that score is 0.979. As the graph illustrates and the test results confirm, *no* statistically significant difference exists in forest vegetation density between parks and non-parks. In other words, formally protected areas do not have a higher frequency of abundant forest vegetation density than areas with alternative institutional arrangements. Legal designation of protection is by no means a requisite for forest maintenance. Furthermore, government ownership of forest lands is not correlated with higher levels of vegetation density. The IFRI study found no correlation between vegetation density and forest tenure type (private, communal, or public).⁶⁰

A closer look at other CIPEC studies illustrates some of the complex factors that influence forest conservation within and outside protected areas. For example, land-cover change in the Maya Biosphere Reserve in the Petén region of northern Guatemala demonstrates both the ability and inability of protected areas to control deforestation (see Figure 2). It also demonstrates the important role that biophysical features and institutional recognition and legitimacy play in forest conservation. The Maya Biosphere Reserve covers more than 21,000

obtained from detailed forest mensuration, including diameter at breast height, basal area, species diversity and dominance, and others. These measures, however, are not useful when we compare forest conditions across ecological zones as we do in this Article.

59. Hayes, *supra* note 57, at 18.

60. *Id.* at 15.

km² and consists of four national parks, three wildlife reserves, a multiple-use zone, and a buffer zone. The national parks and biotopes are strict conservation regions in accordance with the recommendation of IUCN category II.⁶¹ The multiple-use zone permits limited extractive forest activities, and the buffer zone permits sustainable forest use and agricultural practices.

As Figure 2 illustrates, the four national parks in the Maya Biosphere Reserve show mixed conservation results. An analysis of Landsat images from 1986, 1993, and 2000 shows that two of the national parks, El Mirador–Río Azul and Tikal, have very little deforestation and remain almost intact. In contrast, Sierra del Lacandón National Park and Laguna del Tigre National Park show signs of substantial deforestation between 1986 and 2000.

The biophysical attributes of the region as well as the institutional history of the creation of the four national parks within the Maya Biosphere Reserve are some of the factors that contribute to the stability of forests in El Mirador–Río Azul and Tikal. In El Mirador–Río Azul, biophysical features contribute to forest protection. The national park is located in the remote, northern region of the Maya Biosphere Reserve and is accessible only by a three-day trip by mule or helicopter.⁶² The park is officially managed by the Guatemalan Institute of Anthropology and History and the National Protected Areas Council. Nevertheless, it appears that the remote location of the park may be responsible for the forests' protection rather than its institutional designation as a protected area. As *ParksWatch* reports, despite the ecological value of the region, El Mirador–Río Azul lacks a management plan and coordinated monitoring and enforcement between the two responsible agencies.⁶³ Fortunately, due to its remote location, the park is not presently threatened by over-exploitative activities.

In contrast, the location of the Tikal National Park does open it to the potential for outside encroachment. Nevertheless, the composite image in Figure 2 shows that the park has kept its forests relatively intact. The major threats to sustainability are fires started in neighboring territories to clear for agriculture or ranching, and illegal extraction of forest products have produced some forest

61. IUCN Category II is defined as a natural area of land and/or sea, designated to (a) protect the ecological integrity of one or more ecosystems for present and future generations, (b) exclude exploitation or occupation inimical to the purposes of designation of the area, and (c) provide a foundation for spiritual, scientific, educational, recreational and visitor opportunities, all of which must be environmentally and culturally compatible.

IUCN, *THE IUCN PROTECTED AREA MANAGEMENT CATEGORIES* (Information Sheet No. 3, July 2002), available at http://www.iucn.org/themes/wcpa/wpc2003/pdfs/outputs/pascat/pascatrev_info3.pdf.

62. Supporting Online Material to Dietz et al., *The Struggle to Govern the Commons*, *supra* note 46, at 10, available at <http://www.sciencemag.org/cgi/data/302/5652/1907/DC1/1> [hereinafter Supporting Online Material].

63. ParksWatch, *Eli Marador-Río Azul*, at <http://www.parkswatch.org/parkprofile.php?l=eng&country=gua&park=mrnp&page=sum> (last visited Mar. 23, 2005).

thinning.⁶⁴

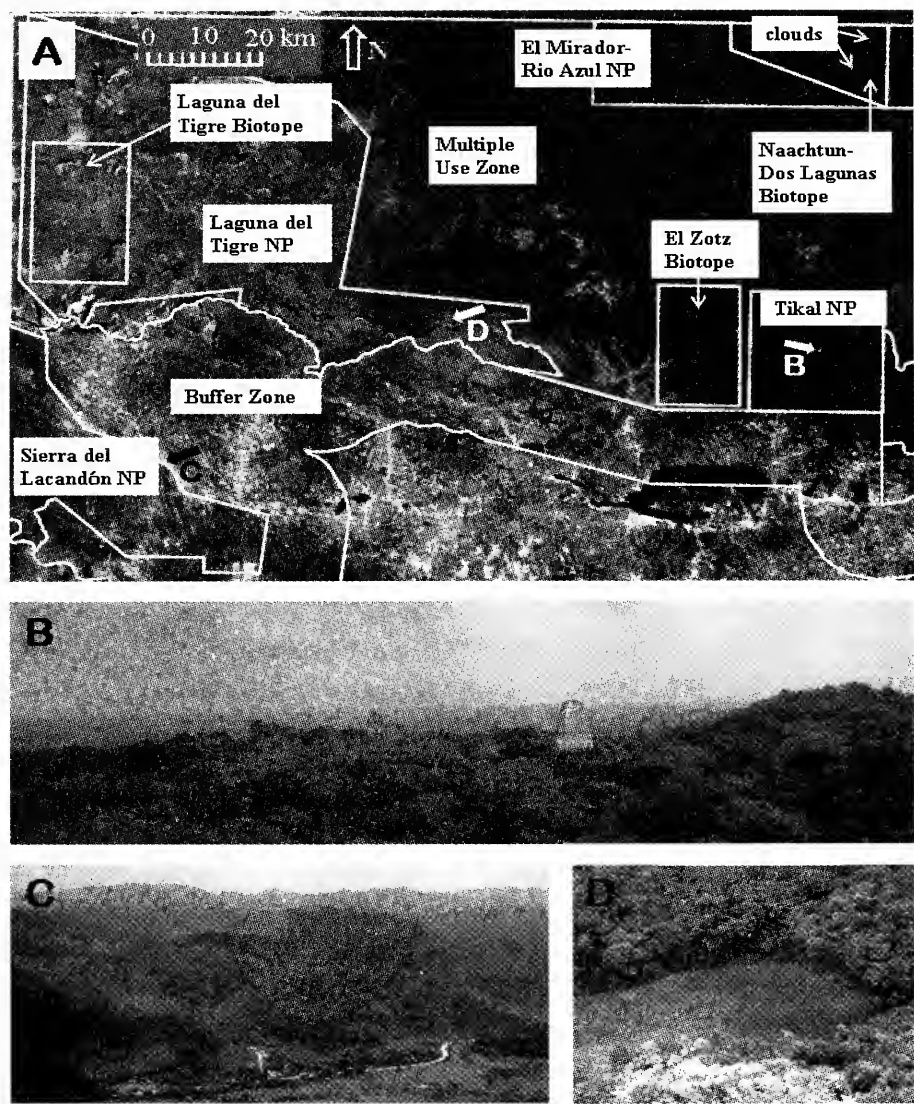


Figure 2. A multitemporal composite of the seven protected areas (national parks and biotopes) and multiple use and buffer zones in the Maya Biosphere Reserve in northern Guatemala (from the Supporting Online Material, *supra* note 62, at 10; composite created by Edwin Castellanos, Victor Hugo Ramos, and Glen Green). Tikal National Park has been monitored effectively, and the forest cover is stable (evidenced by the uniform dark color). Two other northern areas are also stable, due to their inaccessibility. The other four protected areas have experienced substantial illegal logging, conversion to agriculture, and other uses (evidenced by the extensive inroads shown in light gray and white). Official designation as a Biosphere Reserve is not sufficient to protect biodiversity unless substantial investments are made in maintaining and enforcing boundaries.

Widespread recognition of the ecological and cultural value of Tikal National Park, combined with strong institutional and financial support, promote effective

64. Supporting Online Material, *supra* note 62, at 11.

conservation. Created in 1955, Tikal was well established before the region experienced a dramatic advance of the agricultural frontier in the 1980s and before the creation of the Maya Biosphere Reserve in 1990. Tikal is nationally and internationally acclaimed for its cultural and biological uniqueness. It is also financially successful. Revenue from entry fees not only covers the park's entire budget, but also contributes to the Guatemalan Ministry of Culture and Sports. As a result, Tikal is one of the best-staffed protected areas in Guatemala with well-paid park guards and park officials who are held accountable for the continued protection of the park.⁶⁵

Laguna del Tigre National Park and Sierra del Lacandón National Park have been far less successful in preventing deforestation. These parks do not have the biophysical and institutional advantages that El Mirador-Río Azul and Tikal have. Unlike El Mirador-Río Azul, these parks are located in the accessible southern region of the reserve on the edge of the buffer zone. And, whereas Tikal was well established and recognized as a site of national heritage before farmers and ranchers moved to the region, Laguna del Tigre and Lacandón were created as part of the Maya Biosphere Reserve *after* an aggressive colonization policy established by the Guatemalan government encouraged farmers and ranchers to migrate to the region in the 1980s. The parks have since had to try to mitigate the effects of a previous policy that encouraged agricultural expansion into the forested lands.

The present protected area policies are not able to stave off expansion. The numerous light grey and white patches showing the most recent forest cuts demonstrate that these parks have been unable to restrain farmers, ranchers, and loggers from pushing deeper into the forests.⁶⁶ In Laguna del Tigre, the underpaid and understaffed park rangers are unable to prevent illegal activities within the park's borders. Although the Lacandón National Park has a management plan, permanent park staff, equipment, and the best infrastructure support in the Maya Biosphere Reserve, *ParksWatch* reports that park officials are still unable to control illegal activities and that the park's biological diversity is critically threatened.⁶⁷

A recent study of the area within and surrounding the Royal Chitwan National Park in the terai region of Nepal also challenges the presumption that effective conservation is likely to occur primarily in government-owned, protected areas. Nagendra, Southworth, Tucker, Carlson, Karmacharya, and Karna have analyzed regeneration patterns across a time series of remotely sensed images of the Chitwan Valley.⁶⁸ They found that the buffer zone accounts for a major part of the regeneration occurring in this landscape. While there is considerable donor-assisted funding to the buffer zone to encourage regeneration, the buffer zone lies outside the park and is not a legally defined protected area.

65. *Id.*

66. *Id.*

67. ParksWatch, *Sierra del Lacandón*, at <http://www.parkswatch.org/parkprofile.php?l=eng&country=gua&park=slnp&page=sum> (last visited Mar. 22, 2005).

68. Harini Nagendra et al., *Remote Sensing for Policy Evaluation: Monitoring Parks in Nepal and Honduras*, ENVTL. MGMT. (forthcoming).

The findings from the cross-national study, the in-depth case study of the Maya Biosphere Reserve, and the recent study of Royal Chitwan National Park illustrate that while parks do provide forest protection in some settings, their performance varies substantially across sites. Parks are not always effective, nor are they necessarily better at forest conservation than other institutional alternatives.

B. Myth 2: Top-down Enforcement of Protected Area Rules Is Necessary to Protect Forest Cover

In *Requiem for Nature*, John Terborgh argues that communities cannot be left to govern themselves.⁶⁹ He stresses that local communities are unable to manage their resource systems and that enforcement must not be voluntary. According to Terborgh, "[a]ctive protection of parks requires a top-down approach because enforcement is invariably in the hands of police and other armed forces that respond only to orders of their commanders."⁷⁰

No doubt exists that monitoring and enforcement are critical in forest management. Studies of protected areas have consistently found monitoring and enforcement correlated with effective conservation management.⁷¹ Similarly, common-pool resource management scholars have found that clearly defined boundaries, monitoring, and a system of graduated sanctions are important components of sustainable resource management systems.⁷² Common-pool resource scholars, however, have not found that monitoring and enforcement must be administered by a third party.⁷³ CIPEC studies of forest management underscore the importance of monitoring and enforcement, but challenge the belief that local resource users cannot monitor and enforce forest management rules.

Work by Gibson, Williams, and Ostrom reinforces the findings that rule monitoring and enforcement are critical for forest protection.⁷⁴ Their findings also demonstrate that forest users can enforce forest rules. Gibson and colleagues analyzed the rule-monitoring behavior of 178 forest user groups located in 12 countries and coded them in the IFRI database. The user groups included in this study vary substantially in their organization, level of activities, and age. Seventy-five of the user groups included in the study were substantially organized—they elected their own officials, held regular meetings, and undertook

69. TERBORGH, *supra* note 28.

70. *Id.* at 170.

71. See, e.g., IUCN, *supra* note 18; WWF, *supra* note 14; Bruner et al., *supra* note 47.

72. THE DRAMA OF THE COMMONS, *supra* note 46; OSTROM, *supra* note 46; Margaret A. McKean, *Management of Traditional Common Lands (Iriaichi) in Japan*, in MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY 63 (Daniel W. Bromley et al. eds., 1992).

73. OSTROM, *supra* note 46; Clark C. Gibson et al., *Local Enforcement and Better Forests*, 33 WORLD DEV. 273 (2005); Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247 (1992).

74. Gibson et al., *supra* note 73.

joint activities. On the other hand, 29 of the user groups did not undertake any collective activity with regard to the forest they used—they simply shared similar legal standing in relationship to a forest and harvested forest products for household or commercial purposes. The other user groups varied between these two levels of organization.

In our group interviews with members of these groups, we asked them to report on the regularity with which participants in a group monitor or sanction others' rule conformance.⁷⁵ We also obtained measures of the group's social capital, their dependence on forest resources, and their assessment of forest abundance. In general, we found a strong correlation between the level of user group monitoring and forest condition (assessed by the users themselves as well as measured by foresters). We found that the level of user group monitoring and enforcement was correlated with assessments of forest condition even when we controlled for the level of social capital in a group, whether a group was formally organized or not, and whether a user group was heavily dependant on a forest.⁷⁶ Thus, not only do some user groups monitor each others' activities for conformance with rules, the level of such activities is positively associated with better forest condition.

Detailed case studies of forest monitoring and enforcement suggest that protected areas may be more effective when they complement local rule enforcement mechanisms. In Uganda, CIPEC colleagues Abwoli Banana and William Gombya-Ssembajjwe found that protected area policies that acknowledge forest dwellers' use rights encourage the dwellers to collaborate with forest officials in order to protect their forests.⁷⁷ Banana and Gombya-Ssembajjwe compare forest condition in four government forests: Lwamunda, Mbale, Echuya, and Bukaleba. Lwamunda, Mbale, and Echuya are all roughly 1000–1200 hectares. Bukaleba is larger and encompasses 4500 hectares. All of the forests are managed by the Ugandan Forest Department, which is governed by centralized state policies and characterized by a lack of local participation and insufficient human and financial resources.

The critical difference in management policies is that in Echuya the Forest Department staff allows an Abayanda pygmy community to live in and appropriate products from the forest on a daily basis. All other forest users are only allowed to enter the forest once per week.⁷⁸ In their study, Banana and Gombya-Ssembajjwe find less degradation and illegal activities in Echuya than

75. The frequency of a user group's monitoring and sanctioning was coded as never, occasionally, seasonally, or year-round. For analysis, the responses of "never" or "sporadic" were re-coded as "sporadic," and those of "seasonally" and "year-round" were coded as "regular." The variable does not distinguish the source of the rules that were monitored but rather the level of effort that a user group devoted to monitoring established rules in the forest they used.

76. Gibson et al., *supra* note 73.

77. Abwoli Y. Banana & William Gombya-Ssembajjwe, *Successful Forest Management: The Importance of Security of Tenure and Rule Enforcement in Ugandan Forests*, in PEOPLE AND FORESTS 87 (Clark C. Gibson et al. eds., 2000).

78. *Id.*; see also William Gombya-Ssembajjwe, *Institutions and Sustainable Forest Management*, 45 UGANDA J. 51 (1999).

in Lwamunda, Mbale, and Bukaleba forests. The authors attribute Echuya's success, in part, to the monitoring activities of the Abayanda pygmy community who report violations to the Forest Department staff. The authors note that the physical layout of the park also helps protect it, as only one road passes through the forest.⁷⁹

Similarly, a CIPEC study of forest management in Rondônia, Brazil, found greater levels of forest protection when protected area policies coincided with forest users' local institutions than when forest protection policies alienated local traditions.⁸⁰ In the 1980s, Brazil's Institute of Colonization and Agricultural Reform established two adjacent colonization projects in northeastern Rondônia, each with distinct property rights systems and architectural design. One project, Vale do Anari, followed the traditional colonization model that laid out an orthogonal road design in which each farmer was assigned 50 hectares of land, of which 50% was to be preserved as forested land and 50% could be used however the settler desired. In contrast, the other colonization project, Machadinho d'Oeste, was laid out to create 16 forest reserves and developed the settlement based on the area's topography. In this settlement, farmers were able to use their land however they liked so long as they respected the reserve forests. Rubber tappers had long lived in these forests and were given rights to help devise a management plan and use the reserve forests. In his research, Batistella found that the rubber tappers soon became unofficial, but active, reserve monitors.⁸¹

The success of the Machadinho d'Oeste project compared to the Vale do Anari project is illustrated by Landsat images that show the percentage of forest cover loss over time. Images from 1988, 1994, and 1998 show that in 1988, during the initial implementation of the projects, both settlements had similar percentages of forest and pasture. However, by 1998 the overall rate of deforestation in Anari was consistently higher than in Machadinho.⁸² The satellite images demonstrate that, while individuals in both settlements deforested lands for pasture and agriculture, the reserve boundaries in Machadinho were maintained and less forest fragmentation occurred in Machadinho than in Anari.⁸³

As the individual case studies and cross-national investigation confirm, forest users are able to monitor and enforce forest regulations. In fact, as the Uganda and Brazil examples demonstrate, when local institutions and participation are carefully considered in protected area policies, forest users can be crucial in the

79. Banana & Gombya-Ssembajje, *supra* note 78.

80. MATEUS BATISTELLA, *LANDSCAPE CHANGE AND LAND-USE/LAND-COVER DYNAMICS IN RONDÔNIA, BRAZILIAN AMAZON* (Ctr. for the Study of Institutions, Population, and Env'tl. Change, Dissertation Series No. 7, 2001) [hereinafter BATISTELLA, *LANDSCAPE CHANGE*]; Mateus Batistella et al., *Settlement Design, Forest Fragmentation, and Landscape Change in Rondônia, Amazonia*, 69 *PHOTOGRAMMETRIC ENGINEERING REMOTE SENSING* 805 (2003) [hereinafter Batistella et al., *Settlement Design*].

81. BATISTELLA, *LANDSCAPE CHANGE*, *supra* note 80.

82. Batistella et al., *Settlement Design*, *supra* note 80.

83. Supporting Online Material, *supra* note 62.

invocation and application of forest protection policies.

In some settings, "nature," rather than government officials, protects a park. As shown in Figure 2, the remote location of a protected area may be largely responsible for its preservation. El Mirador-Río Azul in the Maya Biosphere Reserve is only accessible via helicopter or a three-day mule trip. This park is apparently in very stable condition even though little planning has been invested in monitoring and enforcement of its boundaries. Similarly, Southworth, Nagendra, Carlson, and Tucker have found that the core areas of Celaque National Park in western Honduras are largely protected due to their inaccessibility and location at elevations above 2300 meters.⁸⁴ Many members of local communities surrounding the park are not aware of the park's existence or, if they know that a park is in the region, they do not know the exact location of the boundaries, and little investment has been made in monitoring and enforcement. The recent expansion of coffee production and agriculture, however, has generated considerable pressure on the park's boundaries. Thus, the preservation of the core of this park is not the result of effective management by Honduran government officials.

C. Myth 3: Local People Are Unable to Make Appropriate Rules

Counter to the presumption that local people are either unable or unwilling to identify forest management requirements and make appropriate rules, IFRI studies of forest management show that resource users are capable of crafting forest rules. Research on the correlation between forest product rules and forest vegetation density in more than 80 IFRI forests in 13 countries finds that the right of user groups to define the forest rules is significantly correlated with forest vegetation density at the 0.05 level.⁸⁵

In the study, rule-making abilities are compared between forests that have above-average vegetation density to forests that have below-average vegetation density, as assessed by the independent forester or ecologist who had completed the forest mensuration. As Figure 3 illustrates, forest vegetation density is sparser in forests where users do not have the right to define the forest rules and higher in forests where they have rule-making responsibilities. In 24 of the 41 forests ranked as having below-average vegetation density, not a single user group has rule-making responsibilities. In contrast, in 24 of the 43 forests considered to have above-average vegetation density, all user groups participate in forest rule making.⁸⁶

The majority of the protected areas in the IFRI study do not give local people the right to make forest product rules for the forests they use. Seventy percent of the non-parks permit all user groups to participate in the forest rule making, compared to only 22% of the parks. Granting rule-making rights to local forest users increases the likelihood that there will be forest product rules to regulate forest use. Investigation of rule making in IFRI forests finds the presence of

84. Southworth et al., *supra* note 53.

85. Hayes, *supra* note 57, at 17.

86. *Id.* at 14.

forest product rules positively and significantly correlates with the ability of user groups to make rules. For example, in 25 of the 39 forests where all user groups are able to make decisions, rules for all forest products have been established by these groups. In only 1 of the 39 forests where users are able to make rules did users decide not to make any rules for the forest products they use. The presence of forest product rules is also significantly correlated with higher levels of vegetation density. Protected areas, however, do not promote the creation of forest product rules. The officially protected areas in the IFRI database have less than half the number of rules than non-parks.⁸⁷

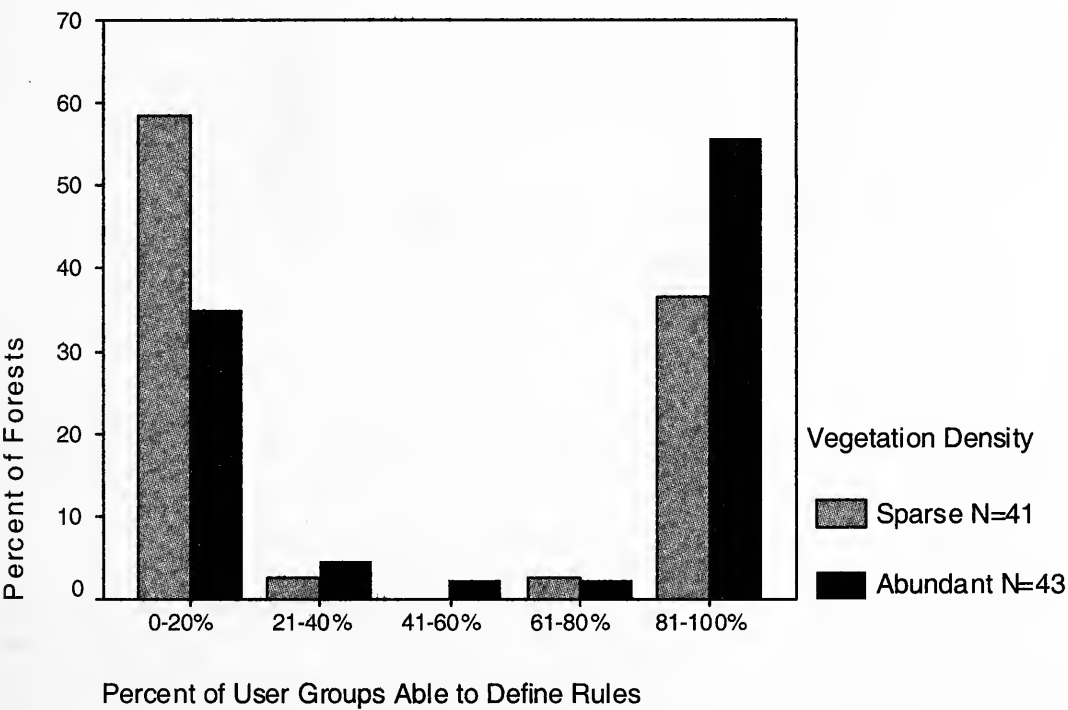


Figure 3. Vegetation Density Associated with User Group Right to Make Rules.⁸⁸

A promising finding from the IFRI study is that parks that give local users rule-making rights have higher levels of vegetation density than parks that do not allow users to make rules. As Figure 4 demonstrates, the parks that do not give any of the local users rule-making abilities have significantly sparser forests than the parks that grant local rule-making responsibilities. A Spearman’s rho correlation coefficient of 0.345 confirms a positive correlation between user group rule-making rights and forest vegetation density that is significant at the 0.05 level. These results echo the findings in Uganda and Brazil that inclusion of local forest users and their institutions in protected area planning and administration may complement park policies for protecting forest cover.

87. *Id.* at 13.
88. *Id.* at 20.

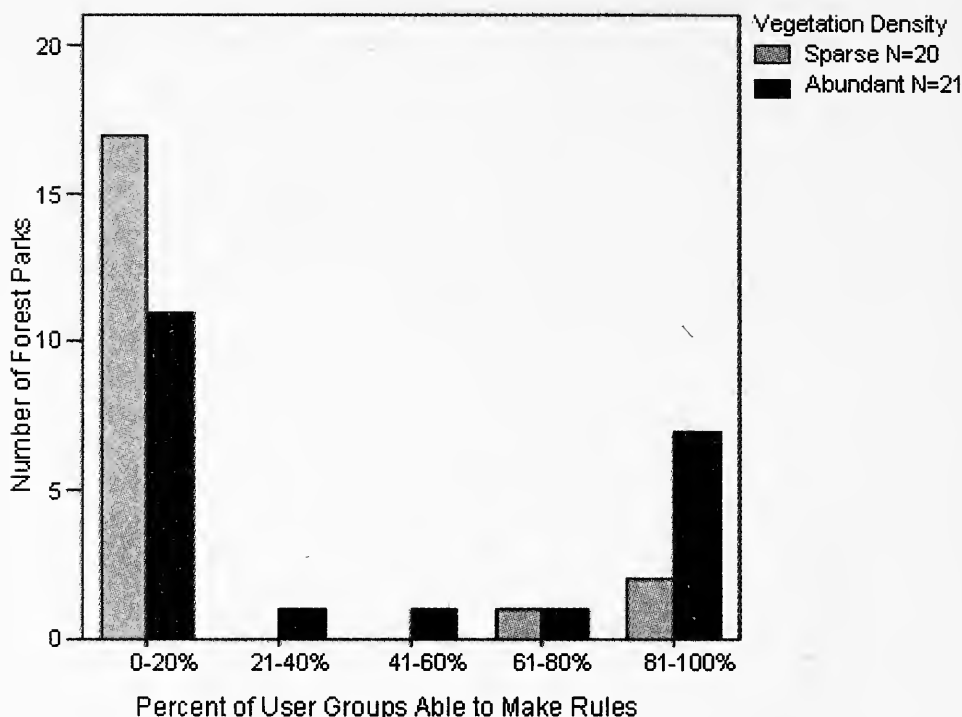


Figure 4. Forest Park Vegetation Density Associated with User Group's Right to Make Rules

V. POLICY IMPLICATIONS

The above findings have several policy implications for forest management, specifically protected area planning and policy design. First, the findings from the IFRI study on protected area forests and several of the case studies clearly refute the belief that *only* legally designated protected areas conserve forests. The findings suggest institutional legitimacy, biophysical features, and the perspective of local residents may greatly influence the ability of a protected area to retain the forest cover within its borders. The findings from case studies as well as the comparative IFRI studies all emphasize the importance of local recognition and respect for protected area policies.

Second, local participation in rule making, monitoring, and enforcement are consistently shown to be significant factors in protecting forest cover. In Uganda and Brazil, protected area administrators increased the legitimacy of the protected area policies and decreased monitoring costs by granting certain local users forest access and use rights in addition to rule-making and monitoring responsibilities. IFRI results show that local users who have been granted rule-making rights have forests with higher levels of vegetation density than those who do not have those rights.

Finally, a topic of constant debate in the conservation arena is over the level of participation that resource users should have in protected area rule-making and management. Few systematic studies have documented whether local participation makes a difference in forest conservation. The results from the IFRI

study on protected areas finds that protected area policies that enable residents to make forest rules are more likely to maintain forest cover. This is an important finding for all involved in protected area planning and implementation.

CONCLUSION

The above findings clearly contradict the belief that protected areas are the only way to conserve forests. While legal designation of protection may contribute to a basic institutional infrastructure that supports conservation, legal designation alone is never enough to ensure forest protection. As the empirical findings from the IFRI studies demonstrate, protected areas do not have higher levels of forest vegetation density than forests that are not legally designated as protected areas. Similarly, the composite image of forest-cover change in the Maya Biosphere Reserve in Guatemala clearly shows that protected area policies do not ensure forest conservation. Instead, forest conservation depends on a web of factors, including, but not limited to, local recognition of the validity of the protected area policy, biophysical features, financial and human resource support, and mechanisms for conflict resolution.

One of the most significant lessons from the empirical studies discussed above is the importance of understanding and recognizing local-level institutions in forest conservation. Local resource users' rule making and monitoring and enforcement activities are significantly and positively correlated with abundant vegetation density. Protected area policies can provide a broader institutional framework, but it is often the local resource users who determine whether conservation policies will be successful. The IFRI forest study shows that, on average, protected areas that do not allow forest users to make rules are ranked lower in vegetation density. The case studies from Uganda and Brazil show forest conservation in protected areas to be, in part, dependent on the monitoring and enforcement activities of the local forest users.

We still have much to learn about policy tools and legal mechanisms for forest conservation. The above findings take a nuanced approach to forest management and begin to dig into the specific policies and legal rights that may promote forest conservation. We still need to investigate what rights and responsibilities should be given to different resource users in different contexts, given that the principal goal is forest conservation. Nevertheless, these findings contradict the presumptions that resource users are incapable of crafting and enforcing forest management rules. They also contradict the belief that strictly regulated protected areas are the *only* way to ensure forest conservation. Instead, they suggest that a system of rights and conservation policies that link state and local conservation efforts may lead to greater protection of the world's forests.

INCENTIVIZING ECOLOGICAL DESTRUCTION? THE GLOBAL JOINT REGULATION OF THE CONSERVATION AND USE OF GENETIC RESOURCES

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I. THE INTERNATIONAL MANAGEMENT OF BIOLOGICAL INFORMATION

For the last ten thousand years, the global exchange of biological information is perhaps one of the most significant processes underlying the development of humanity.¹ Through trade and migration, animals and plants have been introduced into new habitats, selected, and bred for desirable, productive traits. Microbes and biochemical compounds that proved successful at one location have been applied in novel settings to aid a myriad of production processes, from fermentation to providing cures. Most palpable is the effect of global biological information sharing in agriculture and medicine. Modern agriculture would be unthinkable without this purposeful sharing of genetic information across initially tribal and subsequently national boundaries.² Countries around the world share biotechnological innovations that enhance productivity and quality of agricultural production. Likewise, the great variety of pharmaceuticals available to modern man has only been possible through a screening process that examined plants and other organisms for medically useful compounds. While the original life forms may only exist in a specific location, the pharmaceutical mechanism to which it gives rise can be applied, and hence provide benefits, at a global scale.

Many observers have noted that there are two salient characteristics of the global exchange of biological information. One is that it involves two very distinct regions of the world, often referred to as "North" and "South."³ On the one hand, there are developing countries in the South that export "raw" biological information, based on an abundant stock of biodiversity. This "raw" information is usually referred to as "genetic resources" and forms a major

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1. See, e.g., ALFRED W. CROSBY, *ECOLOGICAL IMPERIALISM: THE BIOLOGICAL EXPANSION OF EUROPE, 900-1900* (1986); JARED M. DIAMOND, *GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES* (1997); L.T. EVANS, *CROP EVOLUTION, ADAPTATION AND YIELD* (1993).

2. See, e.g., EVANS, *supra* note 1; JOHN HOLDEN ET AL., *GENES, CROPS, AND THE ENVIRONMENT* (1993).

3. See, e.g., Paul E. Chambers et al., *Debt-for-nature Swaps as Noncooperative Outcomes*, 19 *ECOLOGICAL ECON.* 135 (1996); Timothy Swanson, *The Reliance of Northern Economics on Southern Biodiversity: Biodiversity as Information*, 17 *ECOLOGICAL ECON.* 1 (1996).

contribution of the South to global innovation processes.⁴ The North, on the other hand, consists of industrialized countries that import these genetic resources, use them as a production factor and then export "processed" biological information in the form of biotechnological innovations. This way of looking at the global exchange of biological information suggests seeing it as a bilateral trade between a North and a South, trading in different forms of biological information.⁵ The second important observation is that despite the essential importance of the modern development process for the continued generation of new biotechnological innovations, the supply of "raw" biological information (in the form of biodiversity) is under threat in many of those developing countries that harbor the majority of biological diversity left on this planet. Together, these two observations make it clear that the erosion of the stock of "raw" biological information is a problem of economically significant global interdependencies in informational inputs and outputs between North and South. Managing this problem optimally therefore requires ensuring that decisions taken in the North and South are responsive to the global costs and benefits they create.

In recognition of the nature of this problem, the international community has created a set of institutions that are aimed at regulating both the conservation of the genetic inputs and the rules governing the use of biotechnological outputs. These institutions and their contribution to conservation, trade, and development are at the center of our analysis in this paper. We begin with a short presentation of the international management problem relating to biological information that these institutions are designed to address. We then discuss the institutional responses of the international community to this problem and report on the results of a game theoretic analysis of the current institutions carried out in some of our recent work.⁶ This analysis raises the possibility that one of the reasons why these institutional solutions have so far failed to induce an appropriate level of conservation effort is that the current institutional design contains a critical flaw. The institutions themselves may provide strategic incentives for ecological destruction to continue.

Understanding the nature of the international bargaining process over biological information has important ramifications for learning lessons about how to build institutions that manage global public goods. There is currently a wider debate about the need for a unified international environmental framework such as a World Environment Organization.⁷ Some of the results presented here

4. Swanson, *supra* note 3.

5. Suzanne Droegge & Birgit Soete, *Trade-Related Intellectual Property Rights, North-South Trade and Biological Diversity*, 19 ENVTL. & RESOURCE ECON. 149 (2001); Timothy Swanson & Timo Goeschl, *Property Rights Issues Involving Plant Genetic Resources: Implications of Ownership for Economic Efficiency*, 32 ECOLOGICAL ECON. 75 (2000).

6. RUPERT GATTI ET AL., THE BIODIVERSITY BARGAINING PROBLEM (Cambridge Working Papers in Economics, No. 0447, Sept. 2004).

7. See, e.g., Frank Biermann, *The Case for a World Environment Organization*, 42 ENV'T 22 (2000); John Whalley & Ben Zissimos, *What Could a World Environmental Organization Do?*, 1 GLOBAL ENVTL. POL. 29 (2001).

have relevance to this debate, the debate about how to reconcile developmental and environmental goals in the best possible fashion.

II. THE NATURE OF THE PROBLEM

The need for global cooperation in the field of biodiversity conservation has been recognized for some time.⁸ This global cooperation is usually thought of as requiring two regional parties: a technology-rich and biodiversity-poor North that depends on the South for the supply of biodiverse habitats and for the supply of genetic inputs into the biotechnological Research and Development (R&D) process; and a biodiversity-rich and technology-poor South that depends on the North for highly productive biological technologies.⁹ These differences in natural and technological endowments therefore create significant interdependencies between people living in different parts of the world. From a welfare-theoretic point of view, land-use decisions and the degree of access to biotechnological inputs and outputs should take into account the global nature of the benefits inherent in this sector. This sector of biotechnological exchange, in inputs and outputs, is the center of our focus in this paper.

There are, of course, many areas where such interdependencies exist. North and South are interdependent not only in the areas of biodiversity, but also many other natural resources such as oil and gas and minerals. The natural response to the presence of such interdependencies is for countries to engage in mutually beneficial exchange of these goods, in other words to realize the mutual gains from trade. The problem in the case of the biotechnology sector is that the goods to be exchanged have a very peculiar property, namely that they are mainly informational in character. Both on the input and the output side, the economic interest focuses on the knowledge of the ecological function and genetic composition of a plant or animal. In other words, the benefits are derived from the knowledge of which gene, and at which location in the genetic make-up of the organism delivers productive benefits. This knowledge can exist in various forms, such as the history of crosses that generated a high-yielding cultivar or the precise genetic markers of the crop or, at its most sophisticated level, in the actual genome of the plant. But, the common feature is that it is information, rather than a physically tangible good, that generates the benefits.

One central finding in microeconomics is that information is a very difficult good for markets to allocate efficiently. The non-excludable (and non-rival) nature of informational goods challenges both the practicability (and desirability) of using a market allocation process. Absent some remedial measures, countries seeking access to these informational goods will not do so under what would usually be described as "trade" or voluntary exchange since it would be impossible for the country of origin to prevent another country from

8. Scott Barrett, *The Biodiversity Supergame*, 4 ENVTL. & RESOURCE ECON. 111 (1994); Swanson, *supra* note 3.

9. Naturally, some countries such as India or China are increasingly challenging these categories through the nascent biotechnological capacities.

appropriating those goods. Unless the costs of appropriating informational goods are prohibitively high, the country of origin would not enjoy "seller's privilege," i.e., the possibility to decide who can benefit from the good. In the case of biological information, the absence of seller's privilege would be problematic for both North and South. While the South would be incapable of preventing the appropriation by the Northern innovators of knowledge about desirable crop traits (agriculture) and bioactive compounds (pharmaceuticals), the North could not prevent the imitation and unlicensed use of biotechnological innovations in the South.

The internationally sensitive nature of this not always voluntary exchange of biological information explains the emergence of discussions about new forms of "piracy" committed by North and South. On the one hand, some commentators have pointed to the theft of biological information by the North from the South in the form of plants, animals, and seeds or of traditional knowledge, hence the term of "biopiracy"¹⁰ has entered the political debate. On the other hand, there has been significant debate about "product piracy," i.e., the illegitimate theft of intellectual property of Northern R&D and quality investment by the South. The scale of these debates points to the economic significance of the global interdependencies in informational inputs and outputs of the biotechnology industry.

III. RESPONSES

The problem of enabling rents from the provision of informational goods to be appropriated efficiently exists at different levels of spatial aggregation. However, the capacity of policymakers to address the problem differs markedly depending on whether the informational spillovers are of a local nature, or arise at higher spatial orders. For problems of informational goods, domestic policymakers have access to a wide range of instruments to address the specific challenges posed by informational goods. They range from public provision, to contractual arrangements, to the creation of property rights in informational goods. At the domestic level, these instruments can be implemented with relative ease. In the case of biological resources, typical domestic instruments used to solve the problem are national agricultural research centers, publicly sponsored university research and information dissemination, private contracts between germplasm providers and plant breeders, and intellectual property rights in biological information through patents or particular *sui generis* forms of Intellectual Property Rights (IPRs) such as plant breeders' rights.

While the policy instruments described above provide effective institutional solutions at the domestic level, it is the international level at which the exchange of biological information generates the most significant benefits. Note that the domestic solutions rely extensively on a fiscal and legal infrastructure for their functioning: resources to support public information production and dissemination require a domestic tax base and funding mechanism. Intellectual

10. VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* (1997).

property rights and contracts have to be enforceable through a judicial system. Since the institutional solutions to the challenges of informational goods cross jurisdictional boundaries, there is no fiscal and legal infrastructure at the international level that is developed to the same degree as that available to domestic policymakers. An internalization of the informational externalities at the international spatial scale is therefore much more difficult and requires cooperative efforts among countries in order to generate a comparable structure of rights and enforcement capabilities.

Despite the obstacles involved in setting up institutional solutions at the international level, a number of negotiations among countries throughout the 1980s and early 1990s led to a set of rights and rules that mimic the domestic policy solutions at the international level. As far as biodiversity inputs and biotechnological outputs are concerned, these international rights and rules are enshrined in two separate and distinct agreements, namely the Convention on Biological Diversity and the Agreement on Trade-Related International Property Rights, which will be discussed in detail below. Both conventions explicitly refer to the problem of genetic resources and biodiversity management and state their intention to incentivize their production, maintenance, and international exchange by coordinating the choices in the North and South. The rules and rights that were agreed in these international agreements and have been governing the biological information problem for the last ten years are supposed to capture the externalities inherent in biodiversity inputs and biotechnological outputs.

A. The Convention on Biological Diversity

The Convention on Biological Diversity (CBD),¹¹ in existence since 1992 (and in force since 1993), has created a legal framework that binds the 175 contracting parties to undertake measures to safeguard and enhance existing biological diversity to allow for the conservation and sustainable use of this resource. Central to the CBD are rules about access to genetic resources, as well as agreement about the mechanisms for benefit sharing, funding, and technology transfer. The CBD upholds the established principles of countries enjoying sovereignty over their natural resources and leaves domestic access and benefits sharing rules in the hands of national governments. This principle of informed consent in the use of biological information in itself, however, does not generate any financial flow for conservation. Therefore, in addition, the agreement allows the CBD to distribute funds paid by the North to the South on a project basis through the so-called Global Environment Facility (GEF). Thus, the costs to developing countries of carrying out conservation measures can be financially covered by the mechanism of the GEF. This combination of the accordance of property rights in biological information to national governments and a funding mechanism is intended to address both sovereignty and equity considerations at once.

11. See <http://www.biodiv.org/doc/legal/cbd-en.pdf> for the text of the Convention.

B. Trade-Related Intellectual Property Rights

The second institution created to coordinate the management of biological information is the agreement on Trade-Related Intellectual Property Rights (TRIPS)¹² that arose out of the World Trade Organization (WTO) agreements in 1994. TRIPS specifies that any product or process innovation that fulfills the criteria of novelty, usefulness, and non-obviousness emanating from a signatory country can be subject to patent protection in any other signatory country. This agreement covers plant varieties and animals. To gain access to the benefits of WTO membership, countries without a TRIPS-conforming domestic IPR system have to commit to a short-to-medium development of such a system. TRIPS enshrines three trends characteristic of the modern global IPR system: the broadening of existing rights, specifically for living organisms; the creation of *sui generis* systems to extend IPR principles into new domains; and the increasing standardization of IPR principles.¹³

C. The Joint Regulatory Framework

Despite their separate and distinct origins, both institutions make explicit reference to each other. The CBD refers in detail to the "adequate and effective" protection of intellectual property within the framework of the Convention (Article 16.1). With this, the parties chose to explicitly link the convention to TRIPS, which uses identical language.¹⁴ It also binds parties to seek cooperation on the IPR issue, thus pointing to TRIPS as the emerging standard of IPR protection. There is explicit reference to the role of biotechnological innovations as a vehicle for technology transfer between countries subject to the provisions of adequate IPR protection (Article 17). Therefore, the CBD consciously subordinates itself to TRIPS as far as its provisions relate to the nature of property rights that can be assigned to immaterial goods. Similarly, the TRIPS agreement defers to the CBD insofar as the objectives of genetic resource conservation and the specific form of IPR protection for plants and animals are concerned.

Jointly then, the CBD and TRIPS constitute a coherent institutional framework governing the international management of biological information in terms of inputs (genetic resources) and outputs (new crops and pharmaceuticals). This framework enshrines, through TRIPS, the assignment of property rights in this information and commits countries to enforcing these property rights domestically. At the same time, the institutional framework creates, by virtue of the CBD, a mechanism of technology transfer and financial payments through the GEF. As a result, the international community has institutions in place that should increase investment in biotechnological R&D in the North by providing global protection of the outputs of the innovation process, while at the same time

12. See http://www.wto.org/english/docs_e/legal_e/27-trips.pdf for the full text.

13. GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS, TRADE AND BIODIVERSITY: SEEDS AND PLANT VARIETIES* (2000).

14. *Id.*

the framework should enhance the conservation of genetic resources in the South through financial support mediated through the GEF. With the successful creation of these two institutions and implementation of their operation, the difficulty of managing the conservation and use of biological information appears to be solved.

IV. PROBLEMS

The CBD and TRIPS have now been in existence for a decade and have been widely adopted. In many ways, therefore, these institutions have been a considerable success in terms of demonstrating the capacity of countries to generate solutions to problems of global scale. Countries have drawn up national legislation to supplement the international agreements in the areas of IPR law, in particular *sui generis* systems of plant variety protection.¹⁵ They have also designed and implemented policies targeted at the conservation of biodiversity in general, and genetic resources in particular in, for example, Costa Rica, Ecuador, and the Philippines.¹⁶

However, despite their success as institutions, several observers have noted that while there has been considerable progress in the global adoption of intellectual property rights, on the environmental side there is, so far, little evidence that these international agreements have had discernable positive effects on efforts to halt the degradation of genetic resources in the South. Considerable interest exists in the question why conservation efforts are lacking, despite the presence of a global institutional regime. Various explanations for this failure have been advanced that can be divided into three broad themes. The first theme emphasizes the issue of government failure in various forms. Typical examples are perverse subsidies that are competing with conservation measures and hamper their effectiveness.¹⁷ Other examples are the persistence of dysfunctional property rights,¹⁸ and the lack of complementary rights for farmers or land-owners on which biologically valuable resources exist.¹⁹ Other authors have emphasized the insufficient pass-through of funds received under the payment mechanisms of the CBD from national governments to those individuals that actually make the day-to-day conservation decisions.²⁰ The two other recurrent

15. See BIODIVERSITY AND TRADITIONAL KNOWLEDGE: EQUITABLE PARTNERSHIPS IN PRACTICE (Sarah A. Laird ed., 2002); GRAHAM DUTFIELD, INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCE INDUSTRIES: A TWENTIETH CENTURY HISTORY (2003).

16. See DUTFIELD, *supra* note 11.

17. SERGIO MARGULIS, CAUSES OF DEFORESTATION OF THE BRAZILIAN AMAZON (World Bank, Working Paper No. 22, 2003).

18. Douglas Dewitt Southgate, Jr. et al., *Markets, Institutions, and Forestry: The Consequences of Timber Trade Liberalization in Ecuador*, 28 WORLD DEV. 2005 (2000).

19. Droege & Soete, *supra* note 5.

20. See, e.g., Kelly Day-Rubinstein & George B. Frisvold, *Genetic Prospecting and Biodiversity Development Agreements*, 18 LAND USE POL'Y 205 (2001).

themes are that land speculation destroys incentives for conservation²¹ and that widespread corruption prevents any significant funds from reaching local decision makers.²² An almost universal trait of this literature is, therefore, a scepticism that the incentives created by the CBD are substantial enough to reverse or neutralize existing governance problems.

One possibility that has not been considered explicitly so far in the debate is whether, perhaps, it is the very institutions designed to stimulate conservation that create the actual incentives for biodiverse land to be degraded by developing countries. In other words, the reason for the failure of the institutional solution to induce greater conservation efforts may lie in the design choices enshrined in the CBD and TRIPS as well as external factors. This is the focus of the following section.

V. BIO-BARGAINING AND THE USE OF RATIONAL THREATS

The basic insight underlying the negotiations over a set of international institutions to govern the management of biological information is that there are gains from cooperation available to the parties involved in the bargaining process. What are the gains available to North and South from bargaining over how to jointly manage global biological information? The North's primary benefits arise out of a more productive biotechnological R&D sector. A greater provision of biological resource stocks in the South enhances this productivity, and hence generates gains to the North. The South, on the other hand, benefits from higher productivity in the sectors that use biotechnological products as an input, such as agriculture and health. For these productivity gains to be realized and the South to benefit, the North has to supply biotechnological innovations. Since these biotechnological innovations are the outcome of the R&D process that benefits from a greater supply of biodiversity in the South, there are mutual gains available to North and South from agreeing on how to govern the use of biological information.

Bargaining theory is a branch of game theory that allows one to analyze and predict outcomes of bargaining processes such as the international negotiations over biological information. The foundations of this theory go back to seminal work of John Nash.²³ Two of Nash's fundamental insights into the bargaining process are of importance in the context of trying to understand the North-South bargaining problem. The first central insight is that the precise outcome of the cooperative bargaining process is indeterminate unless something is known about the bargaining power of the parties involved. What can be predicted is that all outcomes should belong to the so-called "bargaining frontier," i.e., the set of outcomes on which the bargaining parties cannot Pareto-improve that are Pareto-optimal in the sense that it is impossible to make one of the bargaining parties better off without making at least one other party worse off. Nash demonstrates

21. MARGULIS, *supra* note 15.

22. See R.J. Smith et al., *Governance and the Loss of Biodiversity*, 426 NATURE 67 (2003).

23. John Nash, *Two-Person Cooperative Games*, 21 ECONOMETRICA 128 (1953).

how knowledge about the bargaining power can be used to resolve the indeterminacy of the predicted outcome. The second critical insight of Nash is that bargaining power alone may not be the only determinant of the final bargaining outcome.²⁴ Depending on the particular situation and the fulfillment of some conditions, parties may be able to use threats in order to improve on the bargaining outcome that would have predicted on the basis of bargaining power only. A typical case for the applicability of so-called "rational threats" is where a party can increase the value of cooperation to the other player without adversely affecting the value of her own outside option, but the actual requirements for threats to be rational (and credible) are less stringent than this.²⁵

In a recent paper, Gatti and his co-authors pursue the question whether, in line with Nash's argument, the failure of the South to increase conservation effort can perhaps be explained as the use of a rational threat in an ongoing negotiation process over how to share the gains from cooperation in the management of biological information.²⁶ If it is in the interest of the South not to halt the continuing degradation of biological information for strategic reasons, the current institutional solutions are not robust against rational threats. This would point to fundamental flaws in the very institutions created to solve the international problem of conserving and using biological information. The authors provide a formal model that analyzes the bargaining process over biological information in the context of the externalities present on the input and output side.²⁷ Here, we summarize and discuss these results in an informal way while referring the reader to the technical paper for more detail.

Figure 1 presents the structure of the North-South bargaining problem that focuses, without loss of generality, on the agricultural aspects of the problem. Both North and South possess land endowments L_n and L_s . In the North, the land endowments are divided between a traditional extensive sector and an intensive biotechnology sector. In the South, there is an additional sector of highly biodiverse "reserve" lands. Trade between North and South takes place in the form of an export of "raw" biological information out of the reserve sector in the South that is absorbed by the intensive biotech sector in the North. The latter, for its part, combines these informational inputs with skilled labor and, as a result, exports high yielding crops to the South. The global problem then consists of determining the optimal size of reserves that enhance the productivity of the biotechnological R&D sector in the North and the optimal size of technology transfer into the intensive sector in the South. Three questions arise: first, whether an optimal allocation can be reached through a bargaining process; second, how the gains from cooperation are distributed between the bargaining parties; and third, whether this distribution of gains is robust against the use of rational threats by one of the parties.

24. *Id.*

25. *Id.*

26. Gatti et al., *supra* note 6.

27. *Id.*

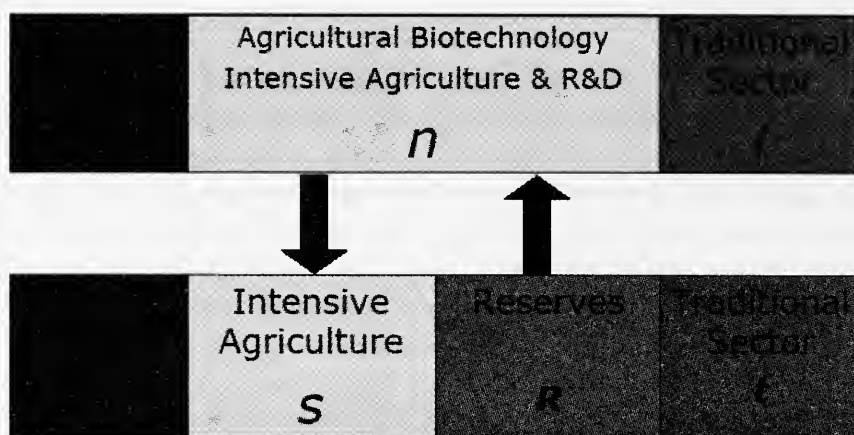


Figure 1: Schematic Structure of the Model

In order to answer the first question, it is necessary to define three important benchmarks, which are illustrated in Figure 2. The first benchmark is the welfare position the parties would reach in the absence of cooperation. This is the putative reference point for the bargaining process relative to which the gains from cooperation can be defined. In the literature, this is usually referred to as the “conflict” payoff. The analytical model determines the conflict payoff as the welfare positions both parties arrive at in the position of autarky, i.e., where no trade and no transfers are taking place. Under fairly general conditions, it can be shown that the autarky point is an interior solution, i.e., the South will conserve some small, but positive amount of reserves that will generate positive externalities for the North’s R&D sector. The South, on the other hand, does not receive either technology transfer embodied in biotechnological products exported from the North or financial compensation for the conservation efforts carried out. These characteristics of the “conflict” payoff are important since they define what gains can be made by cooperating on the provision of more reserves in the South (thus improving the productivity of R&D in the North) and on the provision of biotechnological product by the North (thus improving agricultural productivity in the South). The “conflict” payoff or “autarky point” is denoted with “A” in Figure 2 with associated welfare levels (U_N^a, U_S^a) for the North and South, respectively.

The second benchmark is the so-called “bargaining frontier,” i.e., the point of cooperative bargaining outcomes that are Pareto-efficient. This frontier consists of the set of points “U*” at which no bargaining party can be made better off without reducing the welfare of the other party. This bargaining frontier is denoted by “U*” in Figure 2. Together with the autarky point “A,” the “bargaining frontier” defines a triangle that depicts the social and individual net gains from cooperation. They also define jointly the scope for strategic threats for the bargaining parties. Note that if the autarky point is an interior solution, the South will provide a positive amount of reserves from which the North benefits. If the North’s welfare is increasing in the size of reserves and if the net cost of land degradation bears a low net cost (conversion costs minus gains from conversion, such as timber extracted, etc.), the South can use the size of reserves as a strategic variable.

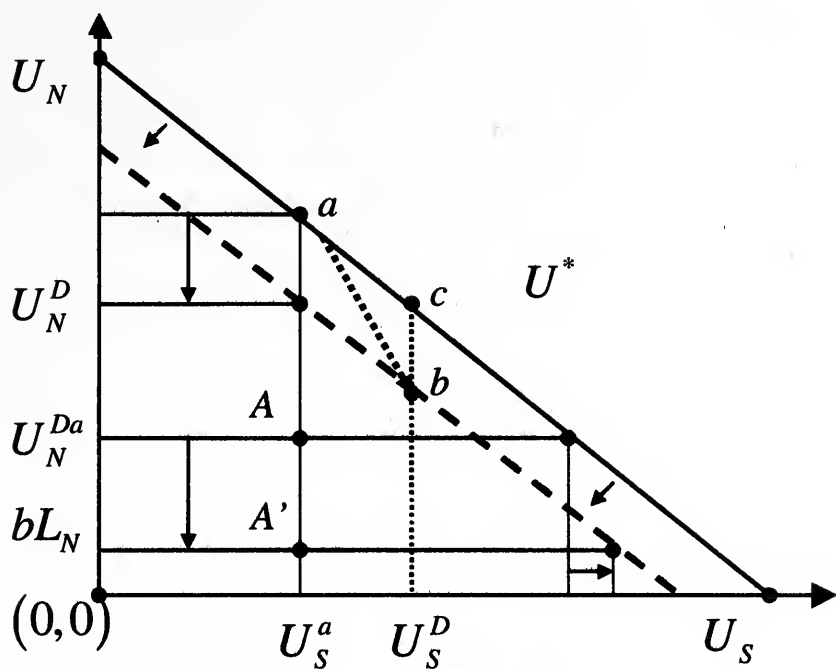


Figure 2: Strategic Destruction as a Bargaining Ploy

If land degradation is a bargaining instrument, the South can use it to vary the size of the bargaining pie, namely by threatening to reduce the social gains available from bargaining. This creates a new benchmark for the North, namely the threat point, which is denoted by “A” in Figure 2. As the figure illustrates, if the South can credibly threaten a payoff combination of (U_N^{Da}, U_S^a) , this increases the relative gains to the North from cooperating with the South.

This existence of these three benchmark points means that in the process of bargaining over rents from optimal land uses, conditions exist in which the South can use the threat of strategic destruction to improve its payoff. It does so by increasing the value of cooperation to the North, in which its payoff is increasing, despite the fact that carrying out this threat would reduce the value of social welfare due to the irreversible loss of valuable reserves. In terms of Figure 2, if the Nash bargaining solution based on bargaining power is represented by point “a” on “U*,” and if the threat is carried out, the solution would move to a point to the southeast such as “b.” This new point is on a bargaining frontier that is everywhere to the left of the original frontier on account of the loss of reserves. It is important to note that the use of destruction as a bargaining tool is virtually independent of the distribution of bargaining power.

In Gatti and his co-authors’ study, this analysis derives two requirements that any bargaining process over how to share the benefits from biological information has to fulfill in order to be robust against the use of rational threats.²⁸ The first is that under the agreement, the South has to achieve a welfare level that

28. *Id.* at 11.

is at least as high as the welfare level it would achieve when it carried out the threat. In other words, the bargaining solution cannot leave the South at a welfare level below " U_S^D ." Points depicting bargaining outcomes with a welfare level to the left of " U_S^D ," therefore do not pass the robustness test. The second prerequisite is that the compensation must be conditioned on the stock of reserves held by the South in order to ensure that the bargaining frontier " U^* " is reached. If these conditions are not fulfilled, the South will have an incentive to degrade biodiverse lands in order to improve on the existing arrangements. This strategy will have two effects. On the one hand, the North will find it worthwhile to reconsider the existing agreements in the light of the declining positive externalities generated by the South. On the other, it will permanently reduce the global gains from cooperation available to the bargaining parties. The obvious next step is to examine whether the current institutional solutions meet both requirements derived in the context of the bio-bargaining game.

VI. INVESTIGATING THE CURRENT INSTITUTIONAL SOLUTIONS

As mentioned in Part III, there are two central institutions that have emerged in response to the biodiversity bargaining problem, the CBD and TRIPS. In this section we discuss these two institutions in light of the requirement that they should be robust against the use of rational threats by the bargaining parties. Of particular interest are the contracts implied by the financial mechanism of the CBD, the Global Environment Facility (GEF). The GEF is the financial mechanism that has emerged as the main coercive instrument for biodiversity conservation for signatories of the CBD. The way in which the GEF allocates and dispenses funding provides the first application of the conclusions of the theoretical bargaining model. The second application is the analysis of the TRIPS agreement with the associated instruments of intellectual property rights such as Plant Breeders Rights (PBRs) and patents. In both cases, we are interested in the extent to which such institutions pass the test for robustness against the South using strategic destruction as a rational threat. The central result from Gatti and his co-authors is that in both cases, current institutions appear to initially place the bargaining power in the North, and yet strategic destruction is a viable option for the South.²⁹

A. *The CBD*

The CBD represents the major international institution that has emerged in response to what we have called the biodiversity bargaining problem. The CBD recognizes that there are considerable gains to be made from cooperation in this regard. In short, it recognizes the bargaining frontier. However, Article 20 of the CBD states explicitly that the implementation of commitments under the convention will depend upon the extent of financial transfers from the developed country signatories. This is implemented by means of the "agreed incremental cost" concept of the GEF under which the North compensates the South for the

29. *Id.* at 21-22.

costs it incurs in relation to the commitments contained in the CBD, e.g., the opportunity cost of foregone land uses.

Applying the incremental cost approach to the case in hand, the indicated contract is one in which the North receives the cooperative gains from innovations/intensive production and compensates the South for the welfare loss associated with the alternative use of land that occurs as the South moves away from the Autarky allocation. Thus, the South ends up at its conflict payoff, represented by point A in Figure 2. In the language of bargaining theory, the South is presented with an extreme point contract. More precisely, this extreme point contract very much reflects the idea of "net incremental" cost: the minimum compensation required to ensure participation, which maintains the South at its pre-contract welfare level.³⁰ Cervigni discusses the extent to which the compensation should reflect the gross or net incremental costs, where net incremental cost is net of any additional benefits that the recipient country alone obtains from the presence of an unconverted or preserved environment.³¹ In this way, net incremental cost is that minimum compensation required to maintain the recipient at pre-agreement welfare levels.

Ultimately, the optimal contract between the North and South is indeterminate in the absence of some previously agreed resolution of the bargaining problem and there is no basis in principle for preferring any one over the others. The incremental cost approach merely defines one of an entire family of contracts that could facilitate the optimal outcome. The choice of an extreme point contract does not represent a complete solution to the bargaining problem for two reasons. First, it implicitly assumes zero bargaining power for the South, and second, it ignores the capacity of the South to engage in strategic bargaining, i.e., strategic destruction.

In reality, bargaining power is not so unevenly allocated between regions and such bargaining strategies have been observed in practice. For example, incremental cost contracts offered by the GEF and World Bank to farmers in Latin America to encourage both changes in agricultural practices to agro-forestry and conservation of remaining forests were met with the response "Bueno, corto todo" (OK, I'll cut the lot!) when compensation for the existing forests was excluded from the offered contract.³² This brings to light the fact that dissatisfaction with the share of the surplus can lead the South not only to reject the initial contract, but also to exert bargaining power in the hope of securing higher welfare upon renegotiation. The South can and does bargain with destruction as predicted by the theory outlined above. Indeed the analysis suggests that, in order to eradicate the incentives for strategic destruction, the optimal North-South contract should not only compensate the South for the incremental cost of biodiversity conservation, but compensation should also be

30. Raffaello Cervigni, *Incremental Cost in the Convention on Biological Diversity*, 11 ENVTL. & RESOURCE ECON. 217 (1998).

31. *Id.*

32. STEFANO PAGIOLA ET AL., PAYING FOR BIODIVERSITY CONSERVATION SERVICES IN AGRICULTURAL LANDSCAPES (World Bank Env't Dep't, Paper No. 96, 2004).

conditioned upon the stocks of reserves. This recommendation is intuitive and similar to previous work on international transfers.³³

B. TRIPS

The discussion above shows that resource ownership is an important determinant of the bargaining outcome. In the case at hand, the outcome turns upon the ownership of innovations and reserves. Therefore, it is critical to investigate the nature of property rights that currently prevail in this sector and the impact they have on the solution to the biodiversity bargaining problem. In this section we present the results of a model of what we call the Prevailing Property Rights structure (PPR) and comment on their implications for understanding North-South bargaining.

Intellectual Property Rights (IPR) protection of innovations has long been an important institution for R&D and the focus of much investigation in the North-South context³⁴ where Plant Breeders Rights (PBRs) and patents are pertinent examples in plant breeding and biotechnology. Indeed, the potential for conflict in enforcement of IPRs across countries led to calls for international harmonization. This culminated in TRIPS under the auspices of the WTO.

TRIPS explicitly allows property rights in genetic resources. However, most states require that they be "improved" or "products of human intervention" rather than simple selections or discoveries of diverse genetic resources. This allows property rights to be taken in genetic resources by those states with the human capital and technological capacity to develop natural genetic resources. It should also be recognized that, in the context of the plant breeding sector, the discussion about IPRs over high yielding varieties (HYVs) reflects the other side of marginal land use decisions to the CBD. That is, since modern agriculture is one of the major causes of deforestation and loss of traditional landraces,³⁵ the extent to which there is transfer of HYVs to the South represents another important determinant of the extensive margin, and hence the level of reserves.

The model developed reflects this property rights structure, that is, the PPR scenario is characterized by IPRs for innovations in the North and very little in the way of intellectual property in the South. The model allows an analysis of the impact of this property rights structure on the choice of contract by our stylized North (endowed with technology) and South (endowed with biological resources). To reflect this apparent imbalance in the strength and implementation of IPRs for innovations in biotechnology, and the absence of specific property rights for genetic traits found in the South, we assume that IPRs only exist for seed innovations emanating from the North. Distinct property rights (intellectual, cultural, historical, etc.) are assumed to be non-existent for

33. Daan van Soest & Robert Lensink, *Foreign Transfers and Tropical Deforestation: What Terms of Conditionality?*, 82 AM. J. AGRIC. ECON. 389 (2000).

34. See, e.g., Elhanan Helpman, *Innovation, Imitation, and Intellectual Property Rights*, 61 ECONOMETRICA 1247 (1993).

35. Swanson, *supra* note 3.

the stock of information accumulated in situ genetic resources supplied by the South.

Ultimately, in the PPR model it is the North-South market for seeds that facilitates the solution to the biodiversity bargaining problem, with the solution being determined by the underlying property rights structure. The enforcement and location of IPRs gives the North some considerable advantage in determining the outcome. The PPR model places the North in the position of monopolist in the export to the South of seeds embodying technology and gives the North free access to the resources important for generating the innovations (the reserves).

The importance of the location of property rights as a means to ensure efficient incentives at each layer of a vertical industry have also been highlighted in the literature.³⁶ Goeschl and Swanson provide a discussion relating specifically to the biotechnology industry.³⁷

In short, discoveries of genetic information contained in reserves are treated as a global public good. Both of these characteristics of the North reflect to a large extent the current property rights with regard to innovations and access to genetic material.³⁸ Given this, the North is able to capture the marginal rental value of both human and fixed capital inputs to R&D (from the North) and the rents associated with the genetic diversity (from the South).

Characterized in this way, it seems that there are two reasons why the prevailing property rights are unlikely to be a sufficient mechanism to guarantee the supply of biodiversity from the South. First, IPRs contain no provisions for the South to be directly remunerated for its contribution to the R&D process. Second, the emergence of an intensive agricultural sector in the South has the potential to lead to greater conversion of reserve land through expansion at the extensive margin. However, there remains an important countervailing force in the PPR model, the impact of technology transfer. The North can internalize the value of biodiversity to the South through the export of seeds which embody innovations. Assuming perfect information, the South will understand that the productivity of intensive agriculture is dependent upon the presence of reserves. Although such technology transfers can be globally suboptimal, they cause the South to share the North's interest in biodiversity conservation (supply), and represent an important mechanism when contracting directly on reserves is not possible.

A thorough analysis of the bargaining process under the prevailing set of property rights shows that the prevailing IPRs are likely to provide an inadequate mechanism to harness the global value of biodiversity and that this leads to an

36. See, e.g., Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986).

37. Timo Goeschl & Timothy Swanson, *Pests, Plagues, and Patents*, 1 J. EUR. ECON. ASS'N 561 (2003); Swanson & Goeschl, *supra* note 5; TIMOTHY SWANSON & TIMO GOESCHL, ON BIOLOGY AND TECHNOLOGY: THE ECONOMICS OF MANAGING BIOTECHNOLOGIES (Fondazione Eni Enrico Mattei (FEEM) Note di Lavoro No. 42.2003, 2003).

38. Timo Goeschl & Timothy Swanson, *The Social Value of Biodiversity for R&D*, 22 ENVTL. & RESOURCE ECON. 477 (2002).

inefficient solution to the biodiversity bargaining problem. The inefficiencies arise not only due to the absence of direct remuneration for reserves and the presence of monopolistic behavior which can increase the conversion of reserves, but also due to the scope for strategic destruction that this bargaining solution can introduce.

CONCLUSION

The global exchange of biological information has been an important source of significant economic development in the past and has great potential for delivering global benefits in the future. What complicates this mutual interdependence between North and South in the exchange of this information is that market prices, and therefore simply trade, cannot be relied upon to sufficiently coordinate the activities of the parties involved. The nature of biological information, specifically its non-excludability, poses great challenges to harnessing the capacity of market-based systems to optimally coordinate choices of the maintenance, production, and exchange of biological information in the North and South. A different set of institutions than market-based exchange is required to allow the potential gains from cooperation to be realized.

It is a considerable success of international cooperation that alternative institutions have been created in the form of the CBD and TRIPS that are intended to resolve the problems of managing the conservation and use of biological information. However, while successful as institutions, there is little evidence that these institutions have done much to address the problem of land degradation in developing countries which continues to threaten the existing stock of biological information on this planet. While there are a number of explanations for this failure that demonstrate why, despite the presence of the current institutions, conservation efforts are lacking, our analysis points to potential problems in the very design of these institutional solutions. This design tends to acknowledge the relatively overwhelming bargaining power of the North in these negotiations by enshrining rules that are of significant benefit to Northern interests: an extensive interpretation of the rights of IPR owners of biotechnological innovation, a restrictive interpretation of the rights of traditional knowledge owners, and an incremental cost mechanism for conservation efforts in the South. What the design of both institutions fails to acknowledge is the fact that the South can improve on the bargaining outcome by carrying out rational threats of land degradation. The implementation of these threats has two consequences: it raises the relative benefit to the North from agreeing to renegotiate the current agreements, and it permanently reduces global welfare by destroying irreversible stocks of biological information.

If the currently agreed international governance of biological information is not robust against the use of rational threats by the South, there is the danger of substantial global cost of institutional failure. These costs are avoidable in principle through the careful design of the institutions to be created. Recently, much more comprehensive and encompassing institutional solutions to global environmental problems have been discussed in the context of a possible World Environment Organization to match issues such as trade and health on a similar

footing. Some proposals have very concrete ideas about how to empower such a body to initiate monetary transfers in return for environmental efforts in developing and industrialized countries. As our discussion about biodiversity conservation and use in this paper shows, any such attempt needs to pay close attention to the lessons that can be learned from more specific agreements.

CULTURE AND HISTORY COUNT: CHOOSING ENVIRONMENTAL TOOLS TO FIT AVAILABLE INSTITUTIONS AND EXPERIENCE

RUTH GREENSPAN BELL*

"I think the lesson we've learned [in the former Soviet Union] is that . . . *issues of governance, issues of legal infrastructures, issues of institutions are absolutely central*"¹

I. A BACKGROUND TO ENVIRONMENTAL CHALLENGES FACING DEVELOPING COUNTRIES

It is not good enough to provide policy advice to the developing world on the basis that the policies must work because theory says they should work. The stakes are too great. Joseph Stiglitz has made this clear in a different context—the reforms urged by the international financial institutions (IFI)—where he has pointed out that policy advice should not be confused with technocratic or engineering solutions. "Technocrats can, of course, make an electricity plant work better—to produce electricity at as low a price as possible. This is mostly a matter of engineering, not politics. Economic policies . . . involve trade-offs"²

These insights are equally applicable when the recommendations are for environmental policy instruments in the developing world and countries in economic and political transition. Although policy instruments are often referred to as tools, or part of a tool chest, the analogy of an "instrument" or "tool" misleadingly implies the construction of a physical edifice (apply this hammer to that nail). In fact, no effort to establish programs to control pollution can be

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1. Robert Lyle, *Has Transition Failed in the Former USSR?*, UKRAINIAN WKLY., May 16, 1999, available at <http://www.ukrweekly.com/Archive/1999/209904.shtml> (quoting Joseph Stiglitz, then Senior Vice President and Chief Economist of the World Bank) (emphasis added).

2. Joseph Stiglitz, *Don't Trust Technocrats*, GUARDIAN, July 16, 2003, available at <http://www.globalpolicy.org/soecon/bwi-wto/imf/2003/0716trust.htm>. Stiglitz goes on to say that "few policy choices are Paretian. Instead, some policies are better for some groups, but worse for others. . . . Deciding which policy to choose involves choices among values, not just technical questions about which policy is in some morally uncontroversial sense 'better'. These value choices are political choices, which cannot be left to technocrats." *Id.*

compared to a simple construction project. The success of any offered policy advice requires a deep understanding of the local context in which the policies are to be applied, including the formal system of laws and regulations and the "informal constraints" and habits of "human behavior, such as conventions, attitudes and norms."³

Environmental tools are heavily value laden and context specific. Often, particularly in the western democracies, environmental tools have been developed in complex legal and regulatory contexts, balancing the needs and interests of a wide variety of stakeholders and interest groups with considerations such as acceptability, as well as affordability.

As developing countries undertake to develop tools to control and combat pollution, they often look to the West for regulatory ideas. The donor community has been quick to recommend particular tools for use in the developing world that have worked in, for example, the United States or Western Europe. It is generally agreed that any effort to become effective environmental regulators normally begins with the development of environmental laws, and as a result, many, if not most, developing world countries have relatively well-developed environmental laws on their books. Some of these laws are quite general or provide direction so unclear that compliance is very difficult. But even where laws are clear and complete, few of the laws or the approaches enshrined in the laws have led to reliable enforcement or good compliance at the source level in the developing world. This has been the subject of much soul searching.

I believe that these failures can be connected back to the fact that regulatory ideas are often promoted without at the same time providing much contextual information. This statement is true for the whole range of available environmental tools, conventional and market-based/market incentive instruments (MBIs). But MBIs pose a special problem. While most conventional tools have been used for some years, many recommended MBI approaches that would harness the market in one way or another have not yet been road tested, even in the advanced western systems of environmental regulation. Environmental development advice is, at best, suspect when the recommended tools have a limited track record or even are a product of academic conjecture rather than real experience.

The purpose of this Article is to initiate a dialogue on how best to move toward the shared goal of cleaner air and water, and how to add greater elements of realism into instrument selection. In the long term, we (the world community and the providers of development assistance) are trying to reach at least two hard-to-attain goals: 1) to develop a common understanding of what issues need to be discussed to consider how to move the discussion about environmental tool selection in the developing world from theory to practice; and 2) to try to think how one can go about identifying the institutions, culture, and habits necessary to support tools for environmental control including MBIs.

3. Patrik Söderholm, *Environmental Policy in Transition Economies: Will Pollution Charges Work?*, 10 J. ENV'T & DEV. 365, 374 (2001) (citing DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990)).

All together, this requires very concrete, fact-grounded discussion. It takes a considerable amount of work to determine whether the tools and mechanisms that have worked well in one context are achievable in another, and whether tools and experience from one system can be transplanted to another, regardless of whether they are conventional or market-based. Because policymakers from the developing world have an obligation to their own constituencies and they have limited resources, they need to understand the full picture. There are considerable costs to chasing dreams.

A. Obstacles to Effectively Managing Pollution

The developing world does not have a strong track record of environmental protection for the control of pollution. The environment came onto the world agenda in 1972 at the United Nations Conference on the Human Environment in Stockholm. In the thirty-two years since then, almost every country in the world has developed formal measures in the form of laws and official institutions (environmental agencies and ministries) toward environmental protection. This has been a major triumph in the sense that environmental policy and efforts to control pollution now have global visibility. However, the sad part of the story is the overall lack of effectiveness of these efforts.

It is fascinating, and troubling, to read reports from the early 1970s on the environmental problems needing attention in the developing world. Many of those reports could have been written today. They indicate that, despite much energy and investment, including environmental policy-related official direct assistance by developed countries in developing countries and countries in transition, little has changed in terms of policy impacts, institutional reform, and environmental improvement. The picture is similar to what the U.S. Council on Environmental Quality projected in 1980 under its "business as usual" scenario. Environmental indicators all point toward continuing deterioration.

In fact, these problems are compounded by new stresses from disease, war, population, and energy and water shortages.⁴ Most environment ministries remain weak, hardly more than symbolic institutions, with little influence over their more powerful sister ministries. Their existing and often comprehensive laws may include ideas from U.S. environmental regulations, initially conventional, or so-called "command-and-control" tools, and, more recently, MBIs.

It is not the purpose of this Article to discuss specifically why these environmental regulations have not proven effective, but only to note that the sluggish pace of environmental protection is commonly attributed to numerous factors: limited resources and personnel; perceived conflicts between environmental and economic goals; inadequate training or experience in self-government; corruption; low-functioning legal systems; pervasive cynicism; and a basic mistrust toward government. In this poisoned atmosphere, the challenge

4. Occasionally, environmental protection is aided by economic failure, such as the closure of nonproductive industries in Central and Eastern Europe following the fall of the Soviet Union.

of developing effective laws and the kinds of consensus and alliances necessary to solve environmental problems is considerable.

B. The Case for MBIs

Environmental policymakers and analysts are understandably frustrated by the conditions described above.⁵ A number of people, particularly environmental economists, have argued that implementation problems can be bypassed by the introduction of MBIs, such as emission taxes and tradable permits.

They argue that where technical environmental expertise and political will is missing, instruments that capture and harness behavioral motivations shaped around neo-classical economic theory can get to the goal of reduced pollution more efficiently and quickly. The MBI advocates contend that these tools can increase economic efficiency, improve and decentralize decisionmaking about control options, provide greater incentives for technological change, and lower overall compliance costs. They support these arguments with experiences from the United States, particularly emissions trading programs for sulfur dioxide (SO₂) and nitrogen oxides (NO_x), in which polluters use the motivation of economic self-interest to sort out how they can, as a whole, reach pollution goals set by the government.

The most enthusiastic MBI advocates argue that countries can by-pass more traditional regulatory approaches, or that adoption of economic instruments might even eliminate the need for regulatory bodies and enforcement programs altogether.⁶ Another argument that came in vogue is that MBIs are the logical end point of leapfrogging, i.e., that countries could examine the environmental regulatory mistakes made by the developed economies and "leapfrog" over them to more efficient solutions.

These arguments were particularly popular in the donor community in the 1990s and were the basis for much donor activity. There is no doubting the potential value of economic instruments in the appropriate technological and institutional circumstances as a way to reduce the overall costs of attaining environmental goals by minimizing compliance costs. However, the MBI

5. Their concerns are heightened as some donor countries and organizations have turned their attention away from the environment. As a result, there have been attempts within the environmental policy community to recast the environmental debate to give it greater urgency, for example as a security issue.

6. Theodore Panayotou of Harvard University has argued that economic instruments take full advantage of the self-interest and superior information of producers and consumers without requiring the disclosure of information or creating large and costly bureaucracies. Thus, he has argued that economic instruments as a group substitute for efforts to enforce compliance and "tend to have lower institutional and human resource requirements than command and control regulations." THEODORE PANAYOTOU, ECONOMIC INSTRUMENTS FOR ENVIRONMENTAL MANAGEMENT AND SUSTAINABLE DEVELOPMENT 52 (United Nations Environment Programme, Environmental Economic Series Paper No. 16, 1994), available at http://www.conservationfinance.org/Documents/CF_related_papers/panyouto_econ_instru.pdf.

advocates have found themselves in a dilemma similar to the efforts they criticized, despite a considerable amount of effort and many planning exercises and studies, MBIs are not making much progress in reducing pollution in the developing world.

There is now growing literature questioning whether MBIs can work as easily as the claims made for them.⁷ The main arguments against MBIs are rooted in institutional realities, much like the arguments Stiglitz has made in the context of international financial institutions (IFI) economic reform advice: most of the countries of the developing world have barriers to the adoption of these instruments in the form of low functioning legal systems, historical inexperience with markets as the West conceives them, distorting and often institutionalized corruption, and, quite simply, very different behavioral habits and customs that cause developing countries naturally to seek solutions other than those dictated by considerations of efficiency or price. While these institutional inadequacies and differences in approach can, in principle, be turned around, changing long standing habits and ways of thinking can be a long and arduous process. They represent very fundamental obstacles.

The discussion above is by way of background only. This Article does not try to resolve this debate about which tools have the best chance of succeeding. Instead, its purpose is to try to identify and examine various institutional

7. See generally MIKAEL SKOU ANDERSEN, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ECONOMIC INSTRUMENTS AND CLEAN WATER: WHY INSTITUTIONS AND POLICY DESIGN MATTER, (2001), available at http://www.sigmaweb.org/pdf/PUMACOG_CleanWater00E.pdf; Ruth Greenspan Bell & Clifford Russell, *Ill-Considered Experiments: The Environmental Consensus and the Developing World*, 24 HARV. INT'L REV. 20 (2003); Ruth Greenspan Bell, *Monitoring International Greenhouse Gas Emissions Trading*, 25 BNA DAILY ENV'T REP., ANALYSIS & PERSP. 806 (2002); Ruth Greenspan Bell & Clifford Russell, *Environmental Policy for Developing Countries*, 18 ISSUES IN SCI. & TECH. 63 (2002), available at <http://www.issues.org/issues/18.3/greenspan.html>; Daniel H. Cole & Peter Z. Grossman, *Toward a Total Cost Approach to Environmental Instrument Choice*, in 20 RESEARCH IN LAW AND ECONOMICS: AN INTRODUCTION TO THE LAW AND ECONOMICS OF ENVIRONMENTAL POLICY: ISSUES IN INSTITUTIONAL DESIGN 225 (T. Swanson & R. Zerbe eds., 2002) [hereinafter Cole & Grossman, *Toward a Total Cost Approach*]; Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Protection*, 1999 WIS. L. REV. 887 (1999) [hereinafter Cole & Grossman, *When Is Command-and-Control Efficient?*]; Clifford Russell & William Vaughan, *The Choice of Pollution Control Policy Instruments in Developing Countries: Arguments, Evidence and Suggestions*, in 7 INTERNATIONAL YEARBOOK OF ENVIRONMENTAL AND RESOURCE ECONOMICS 331 (H. Folmer & T.H. Tietenberg eds., 2003); Söderholm, *supra* note 3; Ruth Greenspan Bell, *Choosing Environmental Policy Instruments in the Real World*, Paper prepared for the OECD Global Forum on Sustainable Development: Emissions Trading, Concerted Action on Tradeable Emissions Permits Country Forum (Mar. 17-18, 2003), available at <http://www.oecd.org/dataoecd/11/9/2957706.pdf>; William D. Nordhaus, *After Kyoto: Alternative Mechanisms to Control Global Warming*, Presentation at National Bureau of Economics Conference (Oct. 23, 2002), available at <http://www.nber.org/~confer/2002/pef02/nordhaus.pdf>.

elements that affect how any environmental tool might work, with particular emphasis on how to genuinely develop market based solutions, and to set up a framework for further work. The Article starts by identifying and discussing a series of relevant factors and institutional or organizational themes. The list is not necessarily conclusive nor is it presented in any sort of taxonomic order. Hopefully, further work will both expand the list and fill in the details of a workplan to address these issues.

II. THE LEGAL SYSTEM AND GENERAL LEGAL CULTURE AS A FRAMEWORK FOR MANAGING ENVIRONMENTAL POLLUTION

The framework within which any environmental tool works is the prevailing legal system and legal culture. Most tools are incorporated into practice through laws, and often we assume that writing a law is sufficient to institute good practice. Unfortunately, laws have different meanings and significance in different societies. This section examines whether it is possible to rely on law creation to institutionalize specific practices in all societies.

A. What Is the Role of Law in Society? Is It More Than a Formality?

For this discussion, I have grouped countries in three general categories, but all of the distinctions are matters of degree: 1) countries that are genuinely law based (although there may be matters of degree about how faithfully or promptly laws are implemented); 2) countries that have historically had laws but where the laws are overshadowed by informal, much more powerful, decisionmaking processes; and 3) countries that historically have had little or no experience with written laws.

Some countries are or have become genuinely law-based. For historical reasons in those countries, law is the governing principle in the formal relationships between people and between people and government, and laws get their "bite" from courts that have the power to force compliance with them. The United States is in this category; indeed, it has been criticized on the basis that too many trivial disputes end up resolved through formal legal processes.

On the other hand, with some exceptions, it is reasonable to suppose that an environmental law, once enacted, will be complied with in these countries. If it is not, interest groups and stakeholders can use available legal mechanisms to assure that the failure to implement and enforce will be brought to a court for resolution. Much of the regulatory agenda of the U.S. Environmental Protection Agency (EPA) is defined by court-ordered schedules that require the Agency to issue regulations to implement specific laws. In addition, in the United States, citizens rather than the government bring a substantial number of enforcement actions pursuant to citizen suit provisions. These citizen suits are facilitated by publicly available discharge information that makes it easy for a citizen to prove the violation. To some extent, the entire process of environmental implementation and compliance is kept honest by self-appointed watchdogs in the form of the press and the non-governmental organization (NGO) community.

A similar, although not identical, dynamic can be found in some other countries. India, for example, has an independent supreme court that has on

occasion forced government agencies and individuals to implement environmental laws and policies. The court makes itself a forum for "public interest litigation," and has explicitly indicated that it will entertain petitions from social advocates. Moreover, the court functions in the context of a free press and independent NGO community. The court's own actions, as well as information about pollution and health impacts, are routinely reported to the public. This creates a circular dynamic similar to the United States in which public pressure is both informed and created by information disseminated by the press and NGOs, and information about the decisions of environmental bodies leads to further input and pressure from the public. However, environmental enforcement is a dismal failure; in India's lower courts, cases routinely take as long as fifteen years to come to resolution.

The second category consists of a large number of countries with written constitutions and sometimes extensive systems of laws, but where it can fairly be said that the laws are mere formalities. There is a body of legal scholarship that examines how laws on the books in such countries correspond (or do not) to the law in practice, "the way life is actually governed."⁸ The countries of the former Soviet bloc fell into this category before 1989, and some still do. The former Union of Soviet Socialist Republics' (U.S.S.R.) constitution enumerated certain rights of the public. However, these constitutional provisions were not self-executing, and often the authorities failed to enact laws that would implement these basic rights, or wrote laws that effectively subverted the higher requirements.⁹

More fundamentally, even where laws were enacted (whether to carry out constitutional rights or for other purposes), they were not applied in a predictable, even-handed way, and often were disregarded in favor of the imperatives of the powerful leadership. In this sense, the U.S.S.R. was classically a government of men, not laws (the cliché of the United States is that it is a government of laws, not men).

Environmental laws in the Soviet bloc could be (and routinely were) overridden by official but informal decisions, for example, decisions in favor of production. These decisions were generally decisions made in the back room rather than with transparency. Thus, a government official or a plant manager in a state-owned enterprise could decide to override an environmental requirement in favor of the higher priority of meeting a production goal.

In any case, even had there been the desire to prosecute violations of the law, it was difficult to do this. The violator was almost always a state enterprise of

8. See, e.g., Maimon Schwarzschild, *Variations on an Enigma: Law in Practice and Law on the Books in the USSR*, 99 HARV. L. REV. 685, 686 (1986) (reviewing OLYMPIAD S. IOFFE & PETER B. MAGGS, *SOVIET LAW IN THEORY AND PRACTICE* (1983)).

9. For example, the Soviet Constitution granted "freedom of speech, press, assembly and freedom to hold mass meetings and public demonstrations, but with the qualification—effectively rendering them meaningless—that these rights are to be exercised 'in accordance with the people's interests . . . and with a view to strengthening the socialist system.'" See *id.* at 689 (quoting U.S.S.R. CONST. of 1977, art.39).

one form or another (i.e., subservient to another arm of the government structure). Everyone—enterprise and environmental enforcer—answered to the same higher power, which meant that each lacked the independence it needed to do its job, except as authorized by that higher power. Pervasive state ownership meant that economic decisions were subverted to political goals and power relationships, in particular the Party's interest in maintaining full employment and its insistence on politically-set production goals.¹⁰ In this situation, the environment did not stand a chance. To a large extent, these conditions continue to be the norm in China, despite a great many "official" pronouncements on the importance of a clean environment.

In sum, the situation was characterized by basic discrepancies between the laws on the books and actual practice dictated by the individuals in power. Longstanding habits are difficult to break: since the dissolution of the U.S.S.R., the law-making process has become more prominent, and laws have increased in significance. But as many have noted (including Söderholm, discussed in more detail below), personal relationships and extralegal ways of resolving issues have continued to be stronger than law. And law often seems to be a selectively applied vehicle to carry out the objectives of the leadership.¹¹

The third group of countries historically have not conducted their political or commercial business on the basis of laws, and have only recently begun the process of moving toward the creation of a law-based society. Some of these countries have begun writing laws in recent years. Often, however, the motivation for law creation has been in order to adapt to international norms with the hope of attracting outside investment or to join the world trade organization. The impetus is externally rather than internally driven, which means that law creation may take place without a deeper understanding or commitment to the entire culture of laws as a social compact.

China is the largest and most interesting example of this category. Historically, China has been governed on the basis of personal relationships. The recent introduction of written laws is beginning to force people to learn very new ways of managing their lives and relationships. This is a steep learning curve that requires considerable time, even in the best of circumstances. But, this is happening in the context of a society in which, despite the introduction of laws, power is centralized in the Party. So long as real decisions are made on the basis of power and authority rather than law, the mere fact that laws exist probably will not carry much weight when actual decisions are made contrary to what the law demands. Not surprisingly, there are few truly independent NGOs that might act as the guardians of law or as legal watchdogs of government failures in China.

10. It may not always be the case that state ownership is an impediment to environmental improvement, as it seemed to be in the Soviet bloc. I recently heard a Taiwanese expert argue that state ownership made it easier to make environmental improvements.

11. Russian tycoon Mikhail B. Khodorkovsky pointedly said that the prosecutor and judges in his case would base their decisions on instructions from the Kremlin and the prosecutor general, a view confirmed "even by some political analysts with ties" to Vladimir Putin. Steven Lee Myers, *10-Month Trial of Oil Tycoon in Moscow Draws Close*, N.Y. TIMES, Apr. 12, 2005, at A8.

Moreover, unlike, for example, the United States, there is no clear and reliable judicial remedy in China should the government fail to implement or enforce laws. The judiciary is not independent. Judges are appointed by, and answer to, the local people's congress, which is often the same body that controls provincial industry and pays the salaries and social benefits of the local Environmental Protection Bureaus (EPBs). They are said to receive yearly political training, which further undercuts their independence and the likelihood that they will make a decision that is contrary to official doctrine. Despite the existence of "green" newspapers and television outlets in almost every large city, the press is neither free nor independent. In fact, the press is cautious about what issues it will discuss in print and how it goes about such a discussion and adheres to official doctrine.¹²

At an even more fundamental, cultural level, Chinese environmental authorities (such as their EPA, the State Environmental Protection Administration (SEPA), and the local EPBs) are subject to many conflicting goals and purposes. Officially, a clean environment is a stated national goal. At the most practical level, the government knows that its heavy load of pollution could stir up dangerous social unrest. But EPBs also know that their very hierarchical society strongly favors full employment and that it continues to use soft budgets to keep afloat non-productive and polluting industries. Further, the EPBs know that the "owners" of these industries are the same people who pay their salaries. In the complexity of their society, the EPBs are always alert to the unspoken rules that guide their day-to-day actions.

Moreover, although the EPBs know about the laws, they do not have experience working with laws. In any case, the large number of environmental laws China has enacted in recent years tend to be extremely broad "framework" laws, many of which still require sub-laws before they can be implemented. Thus, the mere existence of laws says little about the force and effect of those laws on how people and enterprises interact on a daily basis, including how they manage pollution.

Within the constraints of the society, it is possible for some people to take limited independent action on the environment. One example is a Chinese lawyer who brings suit seeking damages for the victims of pollution. However, he is careful not to challenge the government directly or to complain about its failure to implement the law. Nor, for obvious reasons, can the press be very aggressive in watch-dogging government performance.

Comparing all of these quite varied experiences, one way to think about this is to ask whether law in a particular society is an end point or is an ongoing process. Thus far, in the third group of countries, of which China is an example, the goal has been to get laws in place, while implementation is on a farther horizon. In contrast, in a genuinely law-based country, the mere fact of a law's

12. There are now examples in China of press that is beginning to assert its independence, particularly following the SARs debacle, and also there are examples of crackdowns on adventurous editors. See, e.g., Howard W. French, *China Tries Again to Curb Independent Press in South*, N.Y. TIMES, Apr. 15, 2004, at A14.

passage is only a single point on a larger dynamic in which various stakeholders compete in the creation of the law and in its implementation. These stakeholders act within the framework of institutions designed to assure that the laws themselves are policed, but in none of the three types of countries is the mere passage of a law sufficient to protect the environment.

B. How Much Influence Do Conventions, Attitudes and Norms Play, in Comparison to Formal Institutional Frameworks (Such as Laws on the Books)

Laws on the books may not only be at odds with practice; they may sharply diverge. A variation on the question examined above is the degree to which well-intentioned laws are essentially subverted by deeply-rooted attitudes, existing conventions, countervailing policies, and societal norms. When this is the case, examining and understanding the conventions is as important, if not more, than knowing what are the terms of the law.

An example could be drawn from the odd history of market-like instruments for pollution control early in or even before the transition throughout the former Soviet Bloc. These legal requirements imposed fees and fines on certain emissions and exceedances of regulatory standards. Observers from a neo-classic economics perspective might assume that the charges would discourage violations of environmental requirements. After all, they cut into profits and it is the goal of every manager to maximize profits.

But every Hungarian, Czech, or Russian enterprise manager knew that the charge was an ordinary operating cost for which the enterprise could request compensation through the device of soft budgets.¹³ State enterprises simply were not run on a profit and loss basis—they were run to meet production goals. In fact, even had they wanted to understand the impact of the charges, the enterprises had no familiarity with western style accounting procedures that would have allowed them these kinds of insights. As a result, the fines had no sting (they did not cut into profits because profits were a paper exercise), and managers lacked the tools to understand the impact of charges or fines. Thus, the requirement was a requirement only on paper.

This dynamic would have been impossible to understand from a simple paper examination of the rules. But, what about the fines and charges today when it is said that the economy and enterprises have been privatized? First of all, fines have not been designed to make a real dent on industry's behavior. They are either too small, too inconsistently collected, or they are inconsistent with the barter economy that much of Russia has become. But, even more fundamentally, do we assume that privatization means that firms work in the kind of market environment with which we are familiar and under the conditions of neo-classic market analysis? In fact, the answer may differ country by country. In some countries, this is not a correct assumption. What is a market in Russia is not necessarily the same as a market in the United States or Western Europe.

Söderholm documents that "most elements of the centrally planned economy

13. Söderholm, *supra* note 3, at 368.

continue to exist.”¹⁴ Privatization has taken place in a way such that

[T]he majority of shares essentially belong to the same ministries, committees, and managers [that previously controlled the enterprises and which are] “linked to each other through networks of personal contracts and mutual services, as well as by a system of natural commodity exchanges between their enterprises”. . . . Thus, this informal structure (a heritage from the Communist system) has been hard to change only with formal laws, especially as most plant managers have few incentives to begin to run their plants on pure profit-based criteria. . . . [L]arge enterprises, whose outputs are essential inputs to other sectors of the economy . . . can easily rely on their past connections and make claims on public funds. Soft budget constraints, fixed prices, centrally granted investments, tax offsets, and so forth still exist in important sectors of the national economy, and accordingly evidence of real changes in enterprise behavior is hard to find.¹⁵

What Söderholm says about Russia could be said as well about China’s systems of fees and fines. In practice, the principal impact of the system of fees and charges is to fund the activities of the EPBs, rather than change industry’s behavior by reducing the profits of enterprises that violate the law. Chen Fu and his co-authors point out that because the fees are “too low,” “many enterprises would rather pay emission fees than remedy their pollution problems.”¹⁶ Even if the fees were higher, they would be compromised by the almost certainty that the conditions outlined by Söderholm—continuing soft budgets, centrally granted investments, and tax offsets—still exist on a widespread basis in China. Much of industry continues to be owned and controlled in whole or in part by government at some level.

Further, environmental regulators work in a culture that denies them the independence to bring enforcement actions against powerful enterprises. At the first level is the informal process described in this Article, in which

14. *Id.* at 376.

15. *Id.* at 376-77 (internal citations omitted).

16. Chen Fu et al., *The Control Strategy of SO₂ in China*, in *SO₂ EMISSIONS TRADING PROGRAM: U.S. EXPERIENCE AND CHINA’S PERSPECTIVE* 5, 14 (Wang Jinnan et al. eds., 2000) [hereinafter *SO₂ EMISSIONS TRADING PROGRAM*]. Under China’s Air Pollution Prevention and Control Law (The Air Pollution Prevention and Control Law (Daqi wuran fangzhi fa), Article 48, Chapter 6, (1987 amended 1995, 2000)), the practice that enterprises could pollute in excess of national standards provided they paid fees may change. If emissions exceed the discharge standard, they must be reduced within a specified deadline, and at the same time, the polluter must pay a fine (between 10,000 and 100,000 China Yuan Renminbi (RMB)) to the provincial/local EPBs. See Richard J. Ferris Jr. & Hongjun Zhang, *Key Aspects of the 2000 Amendments to the Air Pollution Prevention and Control Law of the People’s Republic of China*, Briefing for Corporate Counsel and EHS Managers (2001) (on file with author). Implementing sub-laws or regulations may still be pending, but readers are cautioned to consider this law in the context of the discussion about the impact of laws in Chinese society.

environmental requirements that collide with other government goals, such as production targets or full employment, are sacrificed.¹⁷ China labors continually under this tension.

At the next level, there are no serious tools for environmental enforcement. Fees and fines are simply not designed or used to assure compliance.¹⁸ The system is designed principally to assess funds to finance environmental bodies like the EPBs. As a secondary function, EPBs respond to complaints about particularly vexing or egregious environmental threats,¹⁹ which they are authorized to shut down in extreme cases, much as pilots on transatlantic flights asked smokers to refrain from smoking for twenty or thirty minutes when the cabin was particularly full of blue smoke.

As a result, the steady, reliable message to enterprises is the contrary of what it should be to get environmental results: that laws and requirements are infinitely flexible and will bend to conventions, attitudes, and other prevailing norms, in particular the goals of the party in power.

This has particular implications for the possibility of introducing emissions trading. So long as enterprises receive the message that compliance obligations are malleable and subject to change, particularly through negotiation, the main incentive for trading, the opportunity for cost savings against real expenditures toward compliance, is diminished. A different message is essential to make enterprises take seriously an emissions trading program or any other regulatory program.

Finally, environmental remedies must match the prevailing culture. One example of this is deposit-refund regimes on bottles and cans. From a western perspective, recycling is very virtuous. Most people in the United States have only experienced a throw-away society. However, deposit-refund systems do not have the same history worldwide. In some countries they are an unhappy reminder of a world of poverty in which mandatory reuse was a response to deprivation.²⁰ The feel-good culture that supports recycling in the United States

17. In fact, Chinese enforcers have only a limited number of relatively ineffective tools to go after polluters who violate the rules.

18. This was confirmed to the author in the course of personal interviews in March 2001 with enforcement personnel in Taiyuan, Shanxi Province during an Asian Development Bank-funded project conducted by staff from Resources for the Future.

19. The "so-called letters and visits (xinfang) method" of citizen notification of officials of problems such as construction noise, dust, etc. is active in Taiyuan. See William P. Alford & Yuanyuan Shen, *The Limits of the Law in Assessing China's Environmental Dilemma*, in *ENERGIZING CHINA: RECONCILING ENVIRONMENTAL PROTECTION AND ECONOMIC GROWTH* 405, 420 (Michael B. McElroy et al. eds., 1998). The process in response to complaints is to send EPB employees out to take measurements using, for example, mobile monitoring gear, binoculars, and noise readers. The remedies are to: (1) ask for corrections; (2) close facilities; or (3) impose fines. Two levels of appeal are available to enterprises or others who dispute these findings or the remedy. The hierarchy of appeals includes administrative appeals, appeals to the city EPB, the province, and then to a court.

20. Ideas such as these may go over better with younger Central Europeans who do not

may not be present in, for example, the Ukraine. In a few other countries, I have even heard the argument that littering should be encouraged in order to give underemployed people something to do.

Conventions and norms are found in every society, and are ignored at the peril of the regulator. They range from broad social patterns of behavior to political culture. Andersen's examination of the actual functioning of European systems to use market incentives to control water pollution makes this point strongly with respect to political and legal culture:

[T]he choice and implementation of specific policy instruments depends to a considerable degree on the national context, or what we have more accurately described as the national policy style. Strategies for pollution control reflect deeply-rooted traditions of government intervention, and in particular, of the relationship between government and industry. . . . Each nation's regulatory style is thus a function of its unique political heritage. It requires comprehensive knowledge of constitutional, administrative, historical and cultural institutions to understand the opportunities and limitations arising from a particular policy style.²¹

C. What Is the Track Record for Rights to Resources and How Well Enforced Are Contracts? Is the Society Characterized by a Break Between Formal Property Rights and de facto Property Rights? How Are These Matters Resolved?

A corollary to the discussion above, about the use of law to guide relationships in society, is the issue of whether property rights are reliable and stable. Property rights, a clear, identifiable ownership stake in your home, firm, or enterprise, are said to bring a sense of responsibility to the management of that property or enterprise. If it is clearly and defensibly yours, you are more likely to take care of it. Larry Summers, President of Harvard University, likes to say that no one ever washed a rental car.²²

An example of how slippery the concept of property can be in a very different culture is found in practices in the former Soviet bloc in the period between the end of World War II and the decline of Soviet influence. People who thought they owned specific residential properties found that the authorities

remember the reality of state socialism. Cf. SLAVENKA DRAKULIĆ, *HOW WE SURVIVED COMMUNISM AND EVEN LAUGHED* (1991).

21. ANDERSEN, *supra* note 7, at 21 (citations omitted). He takes the economics profession to task for treating "the issue through micro-economic partial equilibrium analysis that disregards the complexities" and is concerned that "to apply economic instruments thoughtlessly may quickly discredit this policy instrument." *Id.* at 6, 23.

22. Lawrence H. Summers, President, Harvard University, Governance and Global Markets, Address Before 50th Anniversary Symposium and Gala Dinner (Oct. 15, 2002), at <http://www.rff.org/rff/Events/50th-Anniversary/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=5464>.

were moving people into those properties when housing was scarce. The "owner" had no recourse but to accept these tenants, who basically by their presence assumed a form of ownership status. In order to reclaim property rights, a Polish friend of mine eventually bought out the "owners" living in parts of his family home by purchasing them apartments elsewhere in the city. In exchange, they moved out and renounced any claim to parts of his home. As far as I know, no courts were ever involved in any part of these transactions, nor was recourse through the courts a realistic proposition. Informal processes moved people in, and eventually out again, challenging the very definition of property rights as we understand them. This was not a unique or unusual experience.

Respect for commercial intellectual property is another example of different notions of property rights. These rights are not well-respected in much of the developing world, in the former Soviet countries, and in China. Although the reason may vary from country to country, this is often attributed to a lingering cultural legacy: where concepts of private property were poorly developed or even were contrary to the prevailing culture, and recourse against appropriation was in any case weak, at best, people got into bad habits that linger to this day. In some extreme situations, stealing something and getting away with it was perceived as part of a larger goal of fighting authority. Another reason for this persistent, widespread, and routine theft may be the lack of effective judicial remedies in the form of independent courts, adequate laws, and other means to resolve issues through legal mechanisms. As a result, infringers cost businesses and governments billions each year.²³

What does this have to do with environmental regulation? In a society saturated with state enterprises, it is likely that regulation is not a relatively neutral process in which each entity has responsibility to meet legal requirements imposed on its pollution. Instead, it becomes a more fraternal or political relationship. State enterprises are part of the state apparatus, and they exercise considerable political influence over the enforcement of environmental laws.²⁴ Of course, in a capitalist economy, private firms also exert a powerful influence, but scholars have noted the "order of magnitude" differences in socialist societies:

[G]overnment officials and enterprises managers in the socialist system had "an identify of interests"; both suffered when funds were diverted from "productive" activities to "unproductive" environmental protection efforts In capitalist economies, by contrast, the interests of firms and government are diverse. And this diversity serves to dilute the influence of industry on such issues and environmental law and

23. Concern about this has led to the creation of organizations such as the Coalition for Intellectual Property Rights dedicated to advancing intellectual property rights protection, enforcement and reform in the countries of the former Soviet Union using public education, legislative action, and legal reform to establish transparent intellectual property rights regimes that adhere to international standards.

24. DANIEL H. COLE, *INSTITUTING ENVIRONMENTAL PROTECTION* 148 (1998).

enforcement.²⁵

The same slippery concept of property that blurs rights in residential properties is also found in the identity of interests between the state and the enterprise. Who actually owns what is not clear. "State ownership" is a kind of shield for the power of human beings who benefit but do not own. The inherent confusion undermines the discipline that property rights might bring into the picture and of the power penalties might impose on enterprises that violate requirements.

Issues of ownership and a basic understanding of the concept of both ownership and contract rights are of particular importance for certain MBIs, such as emissions trading. These are, in effect, the sale of highly intangible commodities. If a society retains considerable confusion and/or ambiguity about the ownership of tangibles such as enterprises, how much more difficult is it to sort out the rights and responsibilities connected with the future rights to emissions from a plant? How do you assure the integrity of the transactions in a country that does not have well-developed contract law principles and enforcement to begin with? And how much more difficult are the problems of assuring that real transactions are taking place when the commodity in question is air? The sale of air raises issues of ownership, verification, and the right to make the sale.

Assuring integrity is quite difficult, even in a society with functioning independent courts and regulatory bodies. The United States was rocked in 2002 by sham energy trades to pump up trading revenue and volume in California reported by Reliant Resources, Dynergy, Enron, and CMS Energy; the out-and-out balance sheet fraud committed by WorldCom; and revelations about seemingly reputable bankers who intentionally structured transactions to allow Enron to hide \$125 million in debt. The courts are only beginning to work through these issues, and some of those who were injured may never be compensated for their damage. When the trade is in support of environmental control, it is even more difficult to compensate the loser after one party cheats because the nature of the damage (unchecked emissions to air or water) is not easily captured in conventional remedies like monetary damages or jail time.

There have been warning bells even in the United States about weaknesses, specifically in the programs that use MBIs to achieve environmental controls that highlight the importance of reliable, sustained enforcement. The U.S. Justice Department discovered that PSEG Fossil LLC, the biggest player in New Jersey's emissions trading system, apparently had not installed necessary pollution

25. *Id.* at 148 (quoting MARSHALL GOLDMAN, *THE SPOILS OF PROGRESS* 188 (1972)). "One question that arises when the states owns regulated enterprises is who regulates the regulator. . . . If the state possesses the political will to regulate for environmental protection, it certainly has enough power to enforce it. And according to Cohen-Tanugi's theory the state is much more likely to have the political will to enforce compliance with environmental regulations against firms it does not own On the contrary, state ownership has created inducements to shield enterprises from public scrutiny and accountability." *Id.*

controls or obtained proper permits. An enforcement action brought in 2002 was resolved in the form of a consent decree. PSEG, without admitting any wrongdoing, agreed to stop selling its credits to other firms and to stay out of the trading system. The withdrawal of one of the largest suppliers of emissions credits in New Jersey brought that state's system to collapse.

In the same year, the South Coast Air Quality Management District (SCAQMD) in California and the regional office of the U.S. EPA looked into charges that a Pasadena broker cheated several firms who paid for emissions credits that were never delivered. The SCAQMD manages emissions trading for the Los Angeles region.²⁶ A third example from the United Kingdom involved a government-sponsored auction in which participating companies bid by offering greenhouse gas reductions. An independent review by Environmental Data Services noted that there were strong grounds to suspect that at least half of the claimed emissions reductions were not real, and blamed the inaccuracies on shortcomings in the Department of Environment, Food, and Rural Affairs regulatory controls and "poorly thought-through rules."²⁷

Each of these incidents was relatively small and caught in time. But if cheating of this type can happen within the context of a well-developed legal and oversight system and with a free press, what are the implications for countries with far less developed concepts of property rights or legal institutions to protect markets against fraud and corruption, and little opportunity for public oversight? The commodity in emissions trading systems is pollution reductions, a daunting logistical challenge of monitoring, reporting, and verification against fraudulent record-keeping or phony reductions. Verification can be expensive and notoriously difficult and rests on domestic systems of environmental enforcement. The entire system collapses without a viable legal system or another institution to ensure the integrity of trades and to act in a timely manner to protect wronged parties.

D. Are There Other Influences or Impacts of a Lax Legal Culture?

A robust legal system provides a means for managing failure, whether it is the failure of plants to control their discharges according to their legal requirements or a breakdown related to more intricate arrangements like emissions trading. The very existence of a reliable legal culture gives participants in the process (as well as the beneficiaries of the regulatory scheme) the confidence to engage in the regulatory scheme because it offers an impartial, effective means to sort out differences and thereby instills a sense of fairness. It also imparts a sense of confidence to the general public, who likely are not involved in particular regulatory decisions, but want to believe that the system is fair. Everyone must believe that everyone else within the system will play by the same rules. Otherwise, the system of regulation erodes. Without this, people

26. *SoCal Air Bosses Probe Broker Deals*, ELECTRICITY DAILY, Aug. 5, 2002.

27. *Free Riders Found in U.K. Greenhouse Trading Plan*, ELECTRICITY DAILY, Apr. 12, 2002.

must find alternative ways of sorting out liability, or decide to opt out and decide for themselves which rules they will follow and which they will not.

These should be considerations for any environmental regulatory program, but they may be acute for emissions trading. An emissions trading system in some ways sets up a series of exceptionally risky transactions in which people exchange an exceedingly complex and intangible property right. They are selling rights to "air," and not only that, often rights that extend into the future.²⁸ The risk is substantial that a party to the transaction could default (e.g., by failing to provide the emissions reductions that was purchased), go into bankruptcy, or fall victim to the temptation of false accounting, as did the U.S. firms Enron and WorldCom in a different context. When real money is at stake, some authority, administrative body, or court must be available to police extremely sophisticated trades and ensure their integrity.

Legal failure can happen any number of ways. The legal system may not be independent, so that when the dispute involves the government (as inevitably it will when enterprises are state-owned), there is little possibility of receiving a fair and independent adjudication. Judges may lack sufficient experience to handle complex legal matters, particularly those that involve environmental science or policy. Courts may be so lacking in resources that they cannot bring cases to conclusion in a reasonable period of time. For example, Indian trial courts can take as long as fifteen years to resolve a simple environmental enforcement case.

Some of these problems can be fixed in time. Some of the former Soviet countries in transition began after 1989 to restore their pre-war European-style legal systems. The post-1989 world gave them the opportunity to restore their independence and freed them of "political and economic 'safety valves,' the legal means of last resort by which Party/state authorities could avoid their own rules."²⁹ But these kinds of changes take time. As noted above, some countries have never had a rule-of-law tradition to revive or fall back on. In those cases, the problems will take even more time to fix.

E. Process of Law Enactment

The very process of enacting a law can provide some clues about the predominant culture of a specific country, and may say something about the depth of commitment to law. A model of sorts is the adoption of the U.S. SO₂ trading program, which came at the end of a protracted debate about whether to adopt MBIs for this particular application. The very idea of using the market was controversial in some circles, and the provisions proposed as amendments to the Clean Air Act were subject to considerable scrutiny by multiple sessions of Congress throughout the 1980s.

28. One interesting test of a country's capacity for environmental MBIs could be whether it is running successful financial markets. As difficult as those markets are, money is a familiar and relatively simple concept, compared with emissions permits.

29. COLE, *supra* note 24, at 80.

The result was a very practical approach designed with a number of important conditions and safeguards to satisfy a wide range of stakeholders, including those who started with significant doubts about trading. The law put government firmly in charge of managing system integrity. It requires industry to obtain and use expensive monitoring equipment to assure that genuine reductions are being sold.³⁰ Every credit (called an "allowance") is assigned a serial number in an elaborate tracking system.³¹ All transactions are online and completely transparent. The government has made a commitment to genuine enforcement to assure that a unit's emissions did not exceed the number of allowances it held over a year. As a result, numerous stakeholders with diverging interests agreed with the program.

In contrast, law drafting in some societies has been, or is still, a closely held process. In the U.S.S.R., the laws were drafted by academically trained experts who were familiar with how other countries wrote such laws. This mostly expert process was not informed by any examination of public willingness to comply, or of the likelihood that industry had the economic and/or technical wherewithal to comply with the rules. The resulting laws were not widely disseminated; indeed, one had to have a "need to know" to obtain laws. This seems to emphasize the conclusion of some commentators that the laws were intended as "show laws" rather than working principles to guide the actions of the U.S.S.R.'s citizens and its government. This version of command and control was notably unsuccessful in the former Soviet bloc.

More fundamentally, the process did not seem either to reflect or be rooted in any deep-seated agreement within society about how much pollution is tolerable, what to do about it, what level of risk the society is willing to accept, and how to manage tradeoffs, for example between growth and control. This is important because environmental requirements place demands at all levels of society, whether it is on motor vehicle drivers to maintain their vehicles or purchase more expensive, cleaner fuels, or on plant operators to install and use control technology or develop more efficient production methods. Any solution to the problems of pollution requires widespread mobilization across each society, as well as commitment not to obstruct or actively subvert the rules. In a democracy, assent is gained through the legislative process. In other forms of society, consensus may be developed in other ways.

In countries where the rules are formulated in secret processes (even if the results are publicly available), the next questions must be where is the support for the rule, how the society proposes to carry out the laws, and how it intends to obtain compliance with the many costly and inconvenient tasks that environmental protection imposes on society. Will sub-rosa habits defeat the rules that never had public acceptance to begin with?

30. 42 U.S.C. § 7651k (2000).

31. *Id.* § 7651b.

III. DOES ADEQUATE INFRASTRUCTURE EXIST TO SUPPORT ROBUST ENVIRONMENTAL REGULATION?

Whatever tool is employed, environmental protection requires infrastructure in the form of an adequate level of knowledgeable personnel and technical training. As an example, U.S. EPA has about 18,000 employees at locations around the country. EPA's resources are augmented by state and local environmental protection bodies, which often have delegated power to carry out regulatory and enforcement tasks. As noted earlier, EPA's enforcement capability is reinforced through provisions that allow citizens to bring enforcement actions in place of the government.³² Of course, one question is how many personnel are necessary to make the system work effectively?³³

The fact of life is that most developing world environment ministries are thinly staffed and highly under-resourced. On the plus side, many of these countries have technically trained civil services that come out of excellent universities, societies with high rates of literacy, and a proliferation of environmental laws. But, collective experience independently implementing and enforcing the environmental laws is often limited. Moreover, most countries have few good enforcement tools—often the only enforcement penalties are variations on the fees and fines system discussed above (with the same frailties),³⁴ criminal penalties, and the right to shut down industry. None of these tools are well-designed to achieve long-term implementation goals.³⁵

IV. WHAT IS THE ECONOMIC CONTEXT WITHIN WHICH THE ENVIRONMENTAL PROTECTION REGIME WORKS, AND HOW SUPPORTIVE IS IT OF THE USE OF WESTERN-STYLE MARKET INCENTIVES TO INFLUENCE SOCIAL BEHAVIOR

A. *Does Industry Genuinely Work in a Market Environment as Defined in the Western Democracies?*

Even in a well-developed market economy, firms may have a number of potentially conflicting objectives. Efficiency might be one, but there can be others. This is at least as true in the developing world and the countries in

32. *Id.* § 7604.

33. One comparison is the European Union's Environment Directorate-General (DG), which is based largely in Brussels and has around 550 staff. Its main role is to initiate and define new environmental legislation and to ensure that measures which have been agreed upon are actually put into practice in the member states. However, environment ministries in member states, and often more local bodies, have the immediate responsibility for putting European Union (EU) environmental measures into practice.

34. *See supra* Part II.B.

35. For a discussion about how Polish environmental enforcers worked to improve their available enforcement tools, in part, by adapting into their own legal and cultural regime mechanisms used in U.S. enforcement, such as compliance schedules, see Ruth Greenspan Bell & Susan E. Bromm, *Lessons Learned in the Transfer of U.S.-Generated Environmental Compliance Tools: Compliance Schedules for Poland*, 27 ENVTL. L. REP., NEWS & ANALYSIS 10296 (1997).

economic transition, where the driving motivation of firms can be quite different from the mostly profit-driven motivation that we assume in the United States.

Despite this, the literature that encourages policymakers to apply MBIs outside of the western democracies appears to make two (not fully articulated) assumptions. One is that enterprises everywhere are principally motivated to be efficient, and these motivations apply as well to how they rate or assess ways to comply with environmental requirements. The second is that, as a result, firms would be natural allies in support of the most efficient environmental tools.

These assumptions are not fully accurate, even in a fully developed market economy. U.S. experience with environmental regulation seems to indicate that firms are not driven entirely by concerns of efficiency. In fact, there may be a big learning curve for firms on these issues. If they had been so motivated, industry might have pushed hard and consistently for market-driven tools from the earliest days of environmental regulation. Instead, industry came around to these issues in much the same evolutionary way as did other parts of the environmental community, arguably based not on theory, but on actual experience.

The first point of inquiry, then, is to ask what motivates industry to support the use of MBIs for environmental regulation? Is it reasonable to suppose in the United States that industry (or some parts of industry) could really understand the resource-saving virtues of MBIs before they had been forced to grapple with the actual costs of environmental regulation accompanied by genuine enforcement? Or, were they eventually motivated toward goals of greater efficiency by the economic pain of enforced compliance? Was on the ground experience necessary to demonstrate the price tag for meeting environmental requirements, or was economic theory sufficient?

This is important because in many countries of the world, compliance is low or erratic. The dichotomy between laws on the books and actual practices, outlined above, has developed its own set of non-classical market incentives. In some societies, the economy runs on networks of personal contracts and mutual services, natural commodity exchanges, or barter agreements. In these countries, the incentives for managers of firms are not the at-best "aspirational" laws,³⁶ but the reality, for example, of production or full employment goals, or some other goal consistent with that society's overall objectives. Under these circumstances, how does one define "incentives" and how does industry assess its best interests? How does a regulator build a culture that sees advantages in cost-saving approaches to environmental requirements?³⁷

36. "Aspirational" is the characterization applied to laws that contain idealistic ambitions and ideology rather than guides to day-to-day behavior.

37. To date, the functioning emissions trading programs in the United States are for air, not water, although the Bush Administration has announced a program for water quality trading. Some analysts, James Boyd at Resources for the Future among them, have expressed doubts about whether the challenges of water basin-based effluent trading—among them highly disparate sources (including non-point), hydrology, and the difficulties of monitoring—can be overcome. JAMES BOYD, *THE NEW FACE OF THE CLEAN WATER ACT: A CRITICAL REVIEW OF THE EPA'S PROPOSED*

B. What Information Does Industry or Government Have About Firms' Costs? What Is the Status of Financial Accounting?

The advocates for relying on market incentives appear to assume that industry knows the costs of environmental protection, the first step to making good decisions about compliance. In fact, it is not correct to assume that businesses in all parts of the world use the same analytic tools, particularly cost accounting.

It is true that industry in the western economies is able to understand and analyze its economic pain because it is the beneficiary of a century of experience with cost accounting.³⁸ But, these assumptions may not be true in some developing countries, which may lack not only elementary understanding of the way markets function, but even more critically, basic tools that can allow them to find out their costs. Price incentives face significant barriers in an economy without the ancillary institutions essential to allow markets to set and enforce prices.

One example has already been mentioned: western style cost accounting was unknown in the U.S.S.R. and is still rare in the new Russia. Industrial ministries, and the bureaucrats who ran them, were responsible for deciding how much of any particular commodity would be produced. Soviet accounting was built on the ideology of central planning that decided all production and distribution. Accounting in that context reflected the influence of a particular philosophy on economic planning, market activity, and enterprise recordkeeping and financial reporting. The way this was managed took various twists and turns, but the basic rule was that detailed annual production targets were formulated through five-year plans by the Party's leadership. Accounting ensured the proper degree of supervision and control in all branches of the economy to assure adherence to the goals.³⁹ During Nikita Khrushchev's economic reforms, the concept of "profit" was introduced into the socialist economy, but as a planned category, calculated as a fixed percentage of cost, rather than what is left over when you subtract expenses from income. Clearly, things have changed, but the question is: how much and how fast?

In other words, the basic tools of economic calculation can differ from society to society. One should not assume that what a firm manager learns from western-style accounting in the western democracies is the same as what another

TMDL RULES 30-32 (Resources for the Future, Discussion Paper No. 00-12, 2000), available at <http://www.rff.org/Documents/RFF-DP-00-12.pdf>.

38. See Söderholm, *supra* note 3, at 366.

39. Because the careers and bonuses of enterprise directors depended on meeting production targets, there was great pressure to exceed the targets prescribed by annual plans, such that directors commonly resorted to such questionable practices as arranging for low production targets by underestimating plant capacity, hoarding supplies and fulfilling output targets by neglecting quality control. The Soviet economic authorities used their own system of cost-accounting to discourage such shortcuts.

manager might learn on the basis of accounting norms in his own system. What western market societies see as tools for documenting commercial transactions, other societies may regard as rules related to pursuing a particular ideology of production. Issues such as these pose basic barriers to the transfer of tools that assume these basic building blocks.

The discussion above focuses on how firms calculate profit and loss. A separate form of unique accounting skills are needed to keep track of the extremely intangible good—air—that is being sold in transactions like emissions trading. Even if the basic financial accounting tools were adequate, other kinds of complex and sophisticated monitoring and accounting would be necessary to account for this form of trading. This is discussed below.

C. Do Authorities Accept the View That Prices or Taxes Can Be a Tool Toward Economic Efficiency?

This section asks about the familiarity and comfort-level of authorities to consider prices and taxes as tools for achieving environmental results, and whether they, in fact, have sufficient experience to consider these options.

Looking again to U.S. experience, the use of trading, prices, and taxes to achieve pollution control either was not immediately obvious to environmental policymakers, or they deliberately decided, for the most part, not to use them for environmental regulation in the early days of the U.S. regulatory system. Congress could have legislated the use of charges or taxes. It did not, despite the existence of a functioning tax code and a full-throttle market economy.⁴⁰ MBIs in general were not the immediately obvious first tool of choice. Even in a well-established market economy, none of the early environmental laws used economic tools.

MBIs eventually came to be adopted into the environmental tool kit as a practical EPA response to some vexing Clean Air Act implementation problems. EPA used available legal authority to set up a system that gave industry the opportunity to bank or sell emission reduction credits in the context of air regulation; this created a price for emissions. As detailed earlier, the success of this early experiment led to the enactment in the 1990 U.S. Clean Air Act of the now well-known SO₂-reduction credit banking and trading program to attack acid rain.⁴¹ Its purpose was to soften the economic impacts of a firm regulatory program by letting firms that can control their pollution more cheaply accumulate and sell credits to firms who must otherwise spend more to reduce pollution. But it is clear from the history of the enactment of these provisions that, when they were introduced, lawmakers considered a great deal more than pure economic policy or engineering.

This is put into stark reality by another example from the United States that

40. EPA could not have done this by itself, as the agency lacked legal authority under the Constitution to unilaterally impose taxes or any charges that went beyond recouping the costs it incurred in, for example, issuing permits.

41. 42 U.S.C. § 7651 (2000).

shows the cultural and political limitations of employing taxes and prices for environmental purposes. In the United States, it is almost impossible, politically, to use taxation to increase the price of gasoline, thereby, trying to discourage excessive driving. There is much discussion of the car culture of the United States; whatever the reason, people are very resistant to perceived limitations on their right to drive cars. Only a very brave legislator will propose a gas tax, although it is likely the most direct way to reduce car mileage. High gas taxes are a fact of life in Europe, where, apparently, taxes are not as frightening.⁴²

Another question to ask is whether the charge or tax is designed to change behavior by making it expensive, or whether it serves some other purpose? As discussed elsewhere in this Article, some countries have institutionalized environmental charges and taxes, but not necessarily for the purpose of bringing about efficiency or, indeed, even because they made the connection between the two.⁴³

Finally, systems of taxation do not work automatically. Environmental taxes or levies are even harder to collect than sales and income taxes, which are already quite difficult in much of the developing world for a myriad of reasons, including the difficulty of monitoring sales or wages and corruption. Taxes on pollution are highly dependent on good environmental monitoring. Pollution discharges generally must be measured by special equipment as they occur. This requires monitoring capability that either does not exist or is extremely expensive in much of the developing world.⁴⁴

And even more fundamentally, the very possibility of taxation rests on political will. It assumes that countries are willing to impose and actually collect charges significant enough to force industry to adopt and install new technology. Further, it assumes that governments can turn around a history of actions designed to insulate firms from market pressures by the equivalent of soft budget constraints, or to protect well-connected firms through loans made on the basis of connections and favoritism, toward decisions based on sound business principles and sober assessment of credit. Using the market to spur technological change is only plausible if one can rule out the many ways in which market forces are undermined.⁴⁵

42. There are signs this attitude is changing in an increasingly automobile-dependent Europe.

43. See *supra* Part II.B.

44. There are alternatives to monitoring, but these require judgments, which can easily fall prey to corruption and favoritism.

45. The *Financial Times*, *New York Times*, and other newspapers have reported repeatedly on lax banking practices in China. See, e.g., Elisabeth Rosenthal, *Bank of China's Mounting Problems*, N.Y. TIMES, Feb. 1, 2002, at W1. China's most prominent state bank, the Bank of China, was hit first by a report from China's National Audit Office, which found that \$320 million of bank funds had been diverted from several branches of the bank through "unlawful loans, off-the-books business and the unlawful granting of letters of credit and issuing bank bills," and then by a lawsuit between the bank and former clients in New York. *Id.* "American bank regulators said an investigation begun in 1999 had turned up the same kinds of irregularities at Bank of China's United States operations" during the 1990s. *Id.* Eventually this led to the dismissal of one of

D. Will Society and the Relevant Stakeholders Tolerate the Use of Market Approaches?

Market based instruments may not “work” in a particular society because they do not fit the prevailing culture for a wide variety of reasons. One example of this in a democracy is when important stakeholders (who might otherwise be comfortable with markets for other purposes) will not accept this kind of approach to environmental regulation. It might also be because of the history and experience of the society in general, as well as its government and industrial sectors.

In the United States, resistance to MBIs is found in both likely and unpredictable quarters—sometimes from NGOs and, in some cases, from industry. People may oppose economic instruments because they fear that emissions trading cannot be adequately enforced or because they mistakenly think these programs sanction pollution.

Surprisingly, industry is sometimes resistant, for example, if a change in regulatory approach might require an expensive or cumbersome change in its internal systems or challenge the existing firm bureaucracy. “Firms may simply support the continuation of the status quo . . . because replacing familiar policies with new instruments can mean the existing expertise within firms becomes less valued.”⁴⁶

Indeed, the success of the SO₂ trading program in the United States has not, thus far, led to wholesale revisions in the U.S. approach to environmental protection. Most regulatory programs continue to use traditional methods—trading is a tool added to a basically conventional approach.⁴⁷ In part, this is because it is technically and politically difficult to make changes in a well-established, ongoing regulatory program. For example, if the change requires legislative amendments, there can be opposition from interests who fear that a reexamination of the law may open discussion about additional issues that industry and other stakeholders would like to avoid reopening, or that it might generate political firefights. As Keohane notes, there may be resistance from the internal bureaucracy or management of firms.⁴⁸ Sometimes too much technology and human resources economic investment is tied up in the status quo.

The process of law amendment may be another practical barrier to change. Environmental legislation originates in several committees in the U.S. Congress, not one. The various committees may be more interested in guarding their jurisdiction or may be dominated by Congressmen (or staffers) with strong opinions or a desire to protect their legislative territory, so much so that reform

China’s most influential bankers. *Id.*

46. NATHANIEL O. KEOHANE, ET AL., THE POSITIVE POLITICAL ECONOMY OF INSTRUMENT CHOICE IN ENVIRONMENTAL POLICY 30 n.52 (Resources for the Future Discussion Paper No. 97-25, 1997), available at <http://www.rff.org/Documents/RFF-DP-97-25.pdf>.

47. The SO₂ trading system is an MBI built on top of a conventional regulatory approach.

48. *Id.*

efforts may not be realistic, despite practical and policy arguments to the contrary. This is one reason why there is very little consistency among the approaches embedded in the various U.S. environmental statutes and the tools they impose,⁴⁹ and one example of the considerable political and bureaucratic vested interests involved in making or changing the rules.⁵⁰

What about attitudes elsewhere in the world? The European Union (EU) has made a commitment to use trading to manage greenhouse gas emissions, but there have been pockets of anti-trading resistance in Europe, and even more in the developing world.⁵¹ For some, emissions trading is a disguised pay-to-pollute scheme in which particular industries or plants are allowed to avoid personal responsibility for the pollution they create.⁵² Still others are resistant to the idea of monetizing pollution, which in their view undercuts the moral dimension of environmental controls. If these convictions are held deeply enough to impede the development of a workable environmental policy, it does no good to say they are wrong-headed.

In addition to ideology, tolerance for market solutions for social issues is very much shaped by experience and habits. If industry and significant parts of the economy have little or no real experience with or exposure to markets as we view them in the West, they might agree to markets in principle, but their daily experience tells them something quite different than the model the western economist posits of the rational man.⁵³

49. For example, some environmental regulations require cost/benefit balancing; others forbid it. Some are health-based; others are technology based.

50. Cole & Grossman, *Toward a Total Cost Approach*, *supra* note 7 (exploring whether so-called command and control is in fact inefficient, and examining in detail the slow evolution of U.S. practice and law); Cole & Grossman, *When Is Command-and-Control Efficient?*, *supra* note 7 (same).

51. JOSEPH A. KRUGER & WILLIAM A. PIZER, THE EU EMISSIONS TRADING DIRECTIVE: OPPORTUNITIES AND POTENTIAL PITFALLS 14 (Resources for the Future Discussion Paper No. 04-24, 2004), *available at* <http://www.rff.org/Documents/RFF-DP-04-24.pdf>.

52. In the context of global carbon trading, the argument is made that affluent countries maintain their expensive lifestyles and use money to make sure that any reforms are conducted only in less affluent nations. *See, e.g.,* Shankar Vedantam, *Kyoto Credits System Aids the Rich, Some Say*, WASH. POST, Mar. 12, 2005, at A12.

53. The dominant neoclassical economic theory holds that individuals, households, and companies rationally serve their best interests and that competition sorts out prices, wages, and the markets for goods and labor in economies' movement toward equilibrium. Some parts of the economics profession are questioning the rational man model. "Behavioral economics"—the study of how people do not make rational choices—is increasingly being applied to securities prices, consumer purchasing, contracts, and labor bargaining. Psychologist Daniel Kahneman of Princeton University shared the 2002 Nobel Prize for work in the area. *See* Peter Monaghan, *Taking on "Rational Man,"* CHRON. HIGHER EDUC., RES. & PUB., Jan 24, 2003, at A12, *available at* <http://chronicle.com/free/v49/i20/20a01201.htm>.

"Neuroeconomists" are also challenging the neoclassic model. Gerald Zaltman of Harvard University says ninety-five percent of consumer decisionmaking occurs subconsciously and this

In many countries, economic life runs on the basis of connections and claims to public funds. Söderholm emphasizes that, in Russia, soft budget constraints, fixed prices, centrally granted investments, tax offsets, and the like still exist in important sectors of the national economy.⁵⁴ These devices continue to exist many years after the fall of state socialism, and are not going away very soon.⁵⁵ The economics profession is starting to recognize that even in the western democracies, the assumptions one makes about economic or market motivation must be adjusted for the reality of the culture and its particular traditions and for a wide range of other influences.

All of the issues outlined above cast doubt on one of the main arguments made following the fall of the Soviet Union for why countries could skip traditional methods of environmental regulation and move directly to harnessing market incentives—that the countries in transition, and the countries of the developing world, could “leapfrog” over the mistakes made in the West. The theory is that Country A can look at the history of regulation in Country B and avoid whatever inefficiency and waste Country B incurred in its environmental learning phase. Presumably, if Country A is a poor country, it will be interested in moving directly to solutions that are the most efficient.

The difficulty with this argument is that it ignores social norms and culture and seems to consider environmental protection as a purely technocratic exercise. The main examples of leapfrogging are found in highly technological situations where culture and habits do not matter very much. The most cited example is the proliferation of mobile phones that overcame infrastructure deficiencies that kept people from obtaining telephone landlines.⁵⁶ But the analogy to environmental

school of thought is bolstered by recent experience such as the bursting of the Internet bubble. Eric Roston, *The Why of Buy*, TIME, Mar. 8, 2004, at A20. “Research from fMRIs and other machines bears all this out. . . . Read Montague, a professor at the Baylor College of Medicine, gave subjects the “Pepsi Challenge” in an fMRI scanner.” *Id.* He found that his subject’s “people reward center” lit up for Pepsi (more pleasing to the palate) but that “Coke’s branding hit literally at the core of their sense of self, a much stronger bond” this suggests that “brands are so powerful that we are sometimes more likely to buy something we identify with than something we like better or that is better for us.” *Id.* Researchers are also examining the impact of money and rational behavior. The distinction that money should be treated as a “mere exchange mechanism” that allows people to purchase things is lost on our brains. *Id.* “The dopamine release that makes a juicy hamburger so satisfying works the same magic even if we simply find the money to buy the burger.” *Id.*

54. Söderholm, *supra* note 3, at 377.

55. *Id.*

56. For an example of how even this issue has cultural and political overtones, see Emily Wax, *Freedom, a Call Away? Control on Cell Phone Use in Eritrea Is Called Tool of Repression*, WASH. POST FOREIGN SERV., Apr. 20, 2004, at A13 (pointing out that the Eritrean government, a country of four million on the Red Sea in the Horn of Africa, has gone to extraordinary lengths to prevent access to information, including denying citizens access to mobile phones). The Eritrean government notice for application for the country’s first cell phones indicated that only government ministers, diplomats, and selected humanitarian organizations would be considered. *Id.*

Elsewhere in Africa,

reforms does not hold on examination, and there are no obvious concrete examples of environmental leapfrogging. The argument sounds good in theory, but in fact, because there are so many differences between societies and countries (including legal, traditions, market culture, history, and the like), taking the experience from another country is an extremely tricky business. Even understanding it is a stretch, and applying it is even something else.

V. LEVEL OF ENVIRONMENTAL AWARENESS AND CONTEXTUAL HISTORY OF ENVIRONMENTAL REGULATION

A. *How Good Is the Available Emissions Monitoring Data? Who Is Responsible for Monitoring?*

Any sort of compliance and enforcement system rests on monitoring—knowing what pollutants and the amounts of those pollutants that are released into the environment by particular plants. This information is particularly important for emissions trading. Although one can argue about the degree of precision that is necessary, it is beyond dispute that regulators and the public must be assured that real, not imaginary, pollution reductions are being traded.

Monitoring can be costly. It requires good equipment, but also a level of integrity. It is as easy to turn off monitoring equipment at inconvenient times as it is to turn off pollution control equipment. It is important to know whether monitoring is the responsibility of the plant or of the government, and who polices the numbers to assure their reliability. As the public often plays a role in data integrity, one might also ask whether the data is made available to the public and how.

It can make a difference whether the monitoring is plant-specific or if it only gauges ambient conditions. For some countries, most available data is ambient, which discloses little about the contribution of specific sources. But, even if the data might include some stack monitoring, it might be difficult to use for any number of reasons. Using China as an example, current pollution policy sets standards for stack gas concentration of SO₂. Pollutant concentrations are based on often-questionable, self-reported data from the enterprises, and on periodic stack testing by the local EPBs. These estimated concentrations are combined with limited data on pollutant flows to calculate mass emissions from the enterprises, and form the basis of the emissions levy. Whether these calculations are adequate for anything more than the limited purpose of the existing levy is an open question.

cell phones have become not just a standard amenity but an indispensable tool of freedom, democracy and safety in war. In northeastern Congo, residents pooled cash to buy cell phones, which they used to notify relatives when rebels were on the move. In Kenya, . . . [p]olling-place workers in December 2002 elections [aided democracy] armed with mobile phones [by] quickly call[ing] in results to the news media and to election headquarters, making vote-rigging difficult.

Cole and Grossman have provided a response to those who minimize the importance of monitoring in proposing alternative regulatory schemes:

[S]tandard economic accounts of the comparative efficiency of alternative regulatory schemes are insensitive to historical, institutional, and technological contexts. Most importantly, they tend to assume "perfect (and, incidentally, costless) monitoring," or they assume that monitoring costs are the same regardless of the control regime that is chosen. . . . [T]here are many other economic, institutional, and technological variables that can affect the comparison of regulatory options, which is precisely why case-by-case examinations are required.⁵⁷

B. Is Enforcement a Disinterested, Independent Function or Is It Highly Influenced by Personal or Informal Relationships, Special Arrangements, and Privileges?

What is industry's experience with enforcement, and what model do plant managers carry in their minds of the likelihood that they will be held responsible for violations of their legal discharge requirements? Is enforcement seen as a consistent and reliable process? Can it be manipulated by well-connected people or is the enforcement process reasonably independent of influence and relationships? What provides environmental discipline to companies? Is it easy to get around enforcement, for example, by bribes?

The answers to these questions can in turn help observers understand the practical incentives that motivate industry. If industry can easily get around the environmental requirements by means of bribes, through personal connections, or by making the case that environmental controls would interfere with production goals or would reduce employment, industry's frame of reference will be very different from what it might be in the context of a rigorous environmental enforcement regime and a culture of compliance. And, the arguments for resource-saving devices, like MBIs, are far less compelling if industry knows it can easily avoid compliance expenditures altogether.

Using China as an example, high officials at SEPA make strong statements about China's compliance intentions,⁵⁸ but enforcement is generally agreed to be very weak, undermined by inadequate resources, poor training, personal ties, corruption, and other manifestations of non-environmental criteria "brought to bear in deciding how the breach of a law or regulation ought to be managed."⁵⁹

57. Cole & Grossman, *When Is Command-and-Control Efficient?*, *supra* note 7, at 935-36, 937-38 (quoting CLIFFORD S. RUSSELL ET AL., *ENFORCING POLLUTION CONTROL LAWS* 3 (1986)).

58. Bureau of National Affairs quotes Xie Zhenhua, Chief of SEPA, that China will "close down heavy polluting, unprofitable, small, and backward factories," and ban "heavy-polluting fuels" from downtown areas of major cities. *Asia and the Pacific: China*, INT'L ENV'T OUTLOOK, Jan. 29, 2003, at 32.

59. Elizabeth Economy, *Environmental Enforcement in China*, in CHINA'S ENVIRONMENT

Enforcement officials in Taiyuan, Shanxi Province, say that they essentially rate enterprises on their compliance.⁶⁰ However, an enterprise can consistently “flunk” by getting a low score year after year, without penalty or consequence. Consistent with Economy’s findings about general conditions in China,⁶¹ the EPB is grossly understaffed and under the political and economic control of the same city or provincial authorities who also supervise industry. Even if they had the independence to do their job, enforcers do not have many strong tools at their disposal. The tools at their disposal are, as noted, mostly the power to collect fees and fines, and to shut plants down, almost always temporarily,⁶² to curb immediate exceedances that communities perceive as threatening.⁶³ This is hardly the kind of signal that forces enterprises to consider finding cheaper ways to comply with the law.

Whatever tools are used, it is far preferable for companies and enterprises to receive a steady, reliable message that the environmental requirements are serious and that they require continuous efforts on the part of all involved toward meeting the regulatory goals. Those who receive such a consistent message are likely to respond differently from those who get the opposite message and are constantly looking for alternative ways through the system beyond compliance. If it is known that the environmental regulator has only weak tools (or motivation) for catching violators or that adjustments can be made if you know the right people, the probability of getting caught, and being punished, will be understood to be low.

Therefore, an important question is whether enforcers have sufficient independence to enforce the rules without fearing that they might arouse powerful interests and endanger their own wages and social benefits. The lesson is the same for conventional and market-based tools. For both, the message to enterprises must be clear, that compliance is mandatory (that, for example, they must either install control technology or purchase emission allowances). But, the need to be completely clear about compliance responsibilities may be acute for emission trading programs where the principal incentive for trading is the opportunity for cost savings against real expenditures toward compliance. Few businessmen make investment decisions based on theory.

Furthermore, even established trading programs require vigilant enforcement, as was demonstrated by the example of New Jersey’s emissions trading program for nitrogen oxides and volatile organic compounds, noted above.

Finally, enforcement is a key ingredient in the compact of trust that

AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 102, 117 (Kristen A. Day ed., 2005).

60. This information comes from personal recollection of interviews I conducted as part of Resources for the Future’s Taiyuan project to introduce SO₂ emissions trading in that city.

61. Economy, *supra* note 59, at 117.

62. Highly polluting industry in Beijing is being physically moved to new locations, in anticipation of the Olympics.

63. A more complete set of enforcement tools could include civil and criminal penalties, administrative tools, the use of compliance schedules, and other flexible “carrot and stick” methods to herd the regulated community toward genuine compliance.

underpins effective environmental regulatory regimes. Compliance is not enhanced if people think they can game the system. And, a key ingredient of basic trust is the belief that requirements that impose costs are administered in, at least, a relatively fair manner. This is equally true for emission trading, where all participants and the community at large must know that allowances represent real commitments to reduce emissions. These are transactions that can easily be abused, particularly since air is such an ephemeral commodity.

The possibility of abuse becomes even more clear when you consider that emission trading can result in very different environmental standards for like industries. If the system works, Plant A will pay Plant B to reduce its emissions, instead of doing so itself. The potential bottom line is a series of varied requirements that hopefully refer back to the trading transaction. But what if Plant A is owned by the most influential politician in the country, in a culture accustomed to helping out privileged people? It would be easy to obscure the fact that the grant of discretion to Plant A to pollute less is not based on a legitimate trade, and the outcome benefits the owner of the Plant, not the environment.⁶⁴ Nordhaus has pointed this problem out in the context of global CO₂ emissions trading:

An emissions-trading system creates . . . a scarcity where none previously existed and in essence prints money for those in control of the permits. Such wealth creation is potentially dangerous because the value of the permits can be used for non-environmental purposes by the country's leadership rather than to reduce emissions.⁶⁵

Confidence in emissions trading transactions has been developed in the United States through a high level of transparency. Competitors, NGOs, and public interest groups can monitor trades and know relatively quickly whether industry is meeting its commitments, a sort of "trust but verify" approach. Elsewhere in the world, it is important to insist on similar safeguards, appropriately crafted to fit their particular circumstances.⁶⁶ From an enforcement perspective, one must

64. Although a trading program can be understood as a transaction, it can also be understood as a grant of discretion to some actors to pollute more (or less) depending on whether they are buyers or sellers of allowances. Otherwise, they would all be held to the same standards. The variability in their requirements is what creates opportunities for corruption.

65. Nordhaus, *supra* note 7, at 15-16. People in the countries in transition are unusually aware of this possibility; their experience includes many years of corruption and under-the-table differential treatment. The environmental experts I have worked with in Central Europe want the assurance that a program that essentially grants discretion to certain industries to emit at lesser amounts than others will not be hijacked to serve the purposes of people in power. Janine Wedel has written eloquently about the breakdown in social norms that happened first in the context of the German occupation of Poland and then in the "twilight world of nods and winks" that characterized the period of communism. JANINE WEDEL, COLLISION AND COLLUSION, THE STRANGE CASE OF WESTERN AID TO EASTERN EUROPE 1989-1998 (2001). Wedel covers these issues in greater depth in JANINE WEDEL, THE PRIVATE POLAND: AN ANTHROPOLOGIST'S LOOK AT EVERYDAY LIFE (1986).

66. This does not mean that the exact protections contained in U.S. law must be replicated.

ask if the law offers the opportunity to protect rights and work out disagreements about rights including disagreements between individuals and the government. The basic issue is whether rights can be removed arbitrarily, or whether there is genuine legal protection for rights and a means of resolving disputes about the rights to specific property.

*C. Does the Society Set Pollution Reduction Goals That
Are Realistically Achievable?*

Pollution reduction goals can themselves be a barrier to implementation and compliance. If the requirements are unrealistic or do not allow adequate time for the practical activities involved in implementation, industry is less likely to take them with the seriousness they deserve.

Enforcement is more likely to succeed if sources know they must meet real targets. Compare this with China. Reduction goals are set in extremely ambitious five-year plans. For example, the plan for Taiyuan, Shanxi Province called for 2005 SO₂ emissions to be reduced by about fifty percent below 2000 levels.⁶⁷ Five-year planning is a process well-rooted in Chinese government and culture, and there is no reason why five-year planning cannot generate achievable goals that can be met in a cost-effective manner. But, the way the Chinese emission reduction goals are set is divorced from realistic considerations of feasibility. The central planners appear to work in somewhat of a vacuum, and it is not clear what their reference points are for the emission reduction numbers they select. Once formulated, it appears that goals are announced to the EPBs and industry (who otherwise appear to be excluded from the goal setting process) and then allocated to specific industries.

A further demonstration of the somewhat fictional nature of these goals is demonstrated by looking at how goal setting interacts with the time frames for compliance contained in the five-year plans. The specific goals are apparently developed and then re-thought *within* the specified time for compliance, that is, within the five-year period in which they are supposed to be achieved. In other words, a reduction goal of fifty percent which must be met by 2005 is announced in 2000 or later, and then may be subject to adjustment. As a result, industry has no lead-time to adjust to the targets or to plan to undertake its share of the responsibilities. Even if Chinese industry had the experience, resources, and

For example, in Western Europe, the public is more tolerant when industry and government sit down to negotiate, so Central European trading programs might work without as much transparency as the United States demands. On the other hand, architects of any trading program in Central and Eastern Europe cannot ignore the legacy of the Soviet period, especially in countries struggling with endemic corruption.

67. It appears that the goals stated in previous plans were equally ambitious, for example calling on China to hold total pollutant emissions to the 1985 level by 2000, and bringing them even lower in the designated "key" pollution control areas. In truth, it is difficult to get reliable data, and there is reason to believe that lower officials often provide the data they believe higher officials want to see.

motivation to undertake these ambitious goals, they still would require extraordinary efforts. Pollution reduction requires planning. Equipment must be ordered, paid for and installed, or processes re-engineered. People must be trained to run the equipment and to service it. All of this takes time.

While one could argue that the five-year plan targets are merely to put pressure on industry to act, that argument must be questioned when you consider the context—poor current compliance and no serious enforcement. Ambitious goals are less likely to succeed when they are understood from the very beginning to be unachievable. Enterprises are much more likely to take a “wait and see” attitude than to invest for pollution control. Allocations can be updated every five years, but a process that appears to move both directions at the same time—setting goals but then moving away from them—sends the wrong signals.

Finally, what if industry simply does not understand what is being asked of it? It is difficult to require compliance if the environment rules are not sufficiently clear. Industry and enforcement officials must understand their responsibilities. If the law or regulation does not have enough detail to guide the permitted party, it is difficult to blame the polluter.

CONCLUSION

Each country that seeks to construct a working system of environmental regulation must consider not only what pollution outcomes it wants to achieve, but also the opportunities and challenges posed by its own history and the basic nature of its existing institutions and legal and bureaucratic culture. If countries have limited history working under systems of law, law writing and legal reform alone will not do the job. Likewise, countries with limited experience with working markets as they are known in the West, or with very different approaches to incentives, must think hard before they put into place the MBIs that are increasingly being used in the United States. These are but two of the many considerations that are critical as countries consider what options they have to regulate pollution in an effective, rather than theoretical, manner.

Much of the advice in recent years to the developing world from the development and assistance organizations, however, has been focused on efficiency. Clearly, it would be preferable if environmental regulations could be designed in ways that maximize efficiency and the potential for cost savings. Even the wealthiest countries cannot afford to waste money, and the poorest societies, those that also have the most daunting environmental protection hurdles to cross, would be well advised to consider regulation that honored this principle. The dream of MBIs for environmental control was born in this central and very legitimate concern. And, in the right technological and institutional circumstances, economic instruments have shown their value as a way to reduce the overall costs of attaining environmental goals by minimizing compliance costs.

But effective efforts toward the goal of environmental protection must honor a number of principles, of which efficiency is only one. It does no good to design tools that are highly efficient, but do not work because they run headlong into ingrained ways of thinking about problem solving. Chief among these are very

distinct differences in how people think about or even experience laws and markets, what infrastructure and institutions are available to carry out particular approaches to environmental protection, and what motivates daily actions of the numerous stakeholders in each country.

For these reasons, any genuine effort to construct effective solutions will require a broad based conversation in society, not a series of technocratic responses. The conversation must reach out beyond narrow specialists such as technical experts or economists, who are, in any event, not the dominant voice in domestic environmental dialogue in the mature environmental regimes. The complexity of the choices involved demands a deep consideration of precisely the same factors identified by Stiglitz—governance, legal infrastructure, and institutions.⁶⁸ Until this point is internalized by the international advisors and by domestic experts tasked to manage the environment (who must be weaned from academic answers and begin to trust their instincts and very real understanding of how things actually work in their own societies), little progress toward domestic environmental protection or global environmental threats is likely.

68. See Stiglitz, *supra* note 2.

SUSTAINABLE ENERGY: A PRELIMINARY FRAMEWORK

LAKSHMAN GURUSWAMY*

INTRODUCTION

This symposium issue of the *Indiana Law Review* on *The Law and Economics of Development and Environment* offers an apposite framework for considering sustainable energy and the global interfaces between economic development, energy consumption, and environmental protection. The instant Article argues first that the manner and extent to which increasing global energy demand can be met within the framework of sustainable development (SD), presents the greatest global environmental challenge of the twenty-first century, and second that new energy accords are needed to meet this challenge. The case for new energy accords that address the challenge of sustainable energy is premised upon six widely recognized phenomena.

These six phenomena are: (i) burgeoning energy demand, especially from the developing world; (ii) the fearful environmental consequences of using fossil fuels or hydrocarbons as sources of energy; (iii) the finite nature of oil and gas reserves; (iv) the energy insecurity caused by reliance on oil; (v) the unsatisfactory nature of the international legal response to the looming shortage of sustainable energy; and (vi) the lack of satisfactory technological, legal, economic, and social mechanisms that address this deficit.

This Article will begin by making the case for new energy accords in Part I, followed in Part II by a delineation of a preliminary framework that allows for the entering into of appropriate international agreements. Part III deals with some questions not answered by the preliminary framework. Part IV then describes the need for a comprehensive treaty review that will form the baseline for the negotiation of new international instruments.

I. THE CASE FOR NEW ENERGY TREATIES

First, according to some estimates, today's current primary global power consumption of about twelve terawatts¹ will reach thirty terawatts by 2040.²

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1. One terawatt equals 1000 gigawatts or one million megawatts.

2. See NEBOJSA NAKICENOVIC ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON EMISSION SCENARIOS 95-96, 221 (2000); Martin L. Hoffert et al., *Advanced Technology Paths to Global Climate Stability: Energy for a Greenhouse Planet*, 298 SCIENCE 981, 981 (2002) [hereinafter Hoffert et al., *Technology Paths*]; Martin L. Hoffert et al., *Energy Implications of Future Stabilization of Atmospheric CO₂ Content*, 395 NATURE 881, 883 (1998). Future energy scenarios are based on complex demographic, socioeconomic, and technological assumptions and thus may vary significantly.

Other forecasts suggest total global energy consumption will expand by fifty-four percent between 2001 and 2025.³ A significant and troubling part of this projected increase in energy demand will occur in developing countries that rely primarily upon the combustion of hydrocarbons, such as coal, to produce the electricity necessary to meet their energy demands.

The increasing demands and consumption of energy by developing countries is of particular relevance to this symposium. In 2001, developing nations consumed about sixty-four percent as much oil as the industrialized nations and by 2025 they are expected to consume about ninety-four percent as much oil as the industrialized nations.⁴ As a result of the increasing reliance of developing countries on fossil fuels (particularly coal, the most carbon-intensive of fossil fuels) and despite lower projected energy consumption levels than that of the industrialized nations, CO₂ emissions from developing countries will be greater than those of developed countries by 2025.⁵

Currently, the United States emits considerably more CO₂ from burning oil than any other country—e.g., more than Africa and Western Europe combined and 2.7 times as much as India and China combined.⁶ The developing countries of Asia are projected to have the strongest energy consumption growth rate, accounting for nearly forty percent of the entire projected increase in world energy consumption through 2025. For developing Asia alone, CO₂ emissions are projected to increase from 6.0 billion metric tons carbon equivalent in 2001 to 11.8 billion metric tons in 2025.⁷ During this same period of time, total U.S. CO₂ emissions from energy use are projected to increase from 5.692 to 8.142 billion metric tons carbon equivalent.⁸

Second, the environmental consequences of using fossil fuels or hydrocarbons to produce energy are formidable and fearsome. Apart from the possibility that hydrocarbons are greenhouse gases that may cause anthropogenic global warming, the entire hydrocarbon energy cycle of production, mining, transportation, refinement, use, and emissions is fraught with daunting environmental and public health problems. The environmental and public health effects and impacts of acid rain, heavy metals, urban smog (created by the mining and burning of fossil fuels) can be very damaging to both developing and

3. ENERGY INFO. ADMIN. (EIA), INTERNATIONAL ENERGY OUTLOOK 2004, at 7 (2004), available at [www.eia.doe.gov/pub/pdf/international/0484\(2004\).pdf](http://www.eia.doe.gov/pub/pdf/international/0484(2004).pdf). The EIA's "reference case" projects total world energy consumption will increase from 404 quadrillion British thermal units (Btu) in 2001 to 623 quadrillion Btu in 2025. *Id.* at 7.

4. *Id.* at 3.

5. *Id.* at 7, Table 1: World Energy Consumption and Carbon Dioxide Emissions by Region, 1990–2025.

6. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 6–7 (2003) [hereinafter AEO2003]; ENERGY INFO. ADMIN., INTERNATIONAL ENERGY ANNUAL, Table H2: World Carbon Dioxide Emissions from Petroleum Consumption, 1992–2001 (2001).

7. ENERGY INFO. ADMIN., INTERNATIONAL ENERGY OUTLOOK, *supra* note 6, Table A9: World Carbon Dioxide Emissions by Region Reference Case, 1990–2025.

8. *Id.*

developed countries.

Third, oil and gas are finite and non-renewable natural resources. While the finite nature of oil and gas is not in doubt, controversy abounds as to the extent, and the anticipated life span of petroleum reserves.⁹ There is sharp disagreement about whether the world faces an imminent prospect of an oil peak followed by an inevitable decline and exhaustion of oil. The advocates of both scarce and plentiful oil scenarios relied on a variety of forecasting tools, and many issues were resolved when, after a five-year collaboration with representatives from the petroleum industry and other U.S. government agencies, the U.S. Geological Survey (USGS) completed a comprehensive study of petroleum resources in 2000. The *USGS World Petroleum Assessment 2000*,¹⁰ has been viewed as the most thorough and methodologically modern assessment of world crude oil and natural gas resources ever attempted.

The U.S. Energy Information Administration (EIA) responded to the USGS study by providing the first federal analysis of long-term world oil supply since that published by Dr. M. King Hubbert of the USGS in 1974.¹¹ The USGS forecasts are more conservative in that they forecast less resources and reserves than the EIA. It is unnecessary to enter into the fray of this controversy because even the more optimistic conclusions of the EIA¹² are consistent with the thesis of this essay.

According to the EIA, the peaking of oil, which they see happening toward the middle of the century, will in part depend on the rate of demand growth. What is germane to sustainable energy as espoused by this Article is that, according to the EIA, the intensity of demand for petroleum will accelerate and

9. What is clear is that while geologists may discover possible oil resources, they will remain in the ground until petroleum engineers can convert those resources into actual producible oil reserves.

10. T.S. AHLBRANDT ET AL., U.S. GEOLOGICAL SURVEY (USGS), U.S. DEP'T OF INTERIOR, *WORLD PETROLEUM ASSESSMENT 2000* (2003) (USGS Fact Sheet FS-0622-03) [hereinafter *WORLD PETROLEUM ASSESSMENT 2000*], available at <http://www.usgs.gov/fs/fs-062-03>. A detailed analysis using the assessment appears in Alfred J. Cavallo, *Predicting the Peak in World Oil Production*, 11 NAT. RESOURCES RES. 187 (2002).

11. John Wood & Gary Long, *Long Term World Oil Supply: A Resource Base/Production Path Analysis* (July 28, 2000) (unpublished presentation), available at http://www.eia.doe.gov/pub/oil_gas/petroleum/presentations/2000/long_term_supply/index.htm.

12. The EIA concludes that the world production peak for conventionally reservoired crude will be closer to the middle of the twenty-first century than to its beginning. John H. Wood et al., Energy Info. Admin., *Long-Term World Oil Supply Scenarios: The Future Is Neither Bleak or Rosy as Some Assert*, at http://www.eia.doe.gov/pub/oil_gas/petroleum/feature_articles/2004/worldoilsupply/oilsupply04.html (posted Aug. 18, 2004). A paper, funded by the Department of Energy's (DOE) Office of Naval Petroleum and Oil Shale Reserves, has not concurred with the projections of the EIA, and supports the thesis of an imminent oil peak. See Harry R. Johnson et al., Office of Naval Petroleum and Oil Shale Reserves, DOE, 1 STRATEGIC SIGNIFICANCE OF AMERICA'S OIL SHALE RESOURCES (2004), available at http://www.fe.doe.gov/programs/reserves/Pubs_NPR/npr_strategic_significancev7.pdf.

advance its exhaustion. However, such demand may be reduced through technological advancements in petroleum product usage such as hybrid-powered automobiles and the substitution of new energy source technologies, such as hydrogen-fed fuel cells.¹³ The demand for petroleum will be reduced even more drastically if, as argued in this essay, there is increased reliance on renewable energy.

Fourth is national security. Traditionally, national security has been associated with armed aggression and the ability to thwart military invasions or subversion. More contemporary concepts of national security include critical threats to vital national and international support systems such as the economy, energy, and the environment. In this context, the increasing reliance on hydrocarbons has created energy, as well as environmental and economic, insecurity.

Because the demand for oil and gas far exceeds the supply within those countries that rely most heavily upon them, these countries are compelled to import oil and gas from politically volatile parts of the world. With half of the world's remaining conventional oil reserves, the Middle East is projected to meet almost two-thirds of the increase in global oil demand between 2003 and 2030.¹⁴ The International Energy Agency (IEA) reports that, through the year 2010, nearly eighty percent of the expected increase in the world's demand for oil is likely to be supplied by Kuwait, Iran, Iraq, Saudi Arabia, the United Arab Emirate, and the Caspian Region—with Venezuela as the only major low-cost, non-Middle East petroleum producer.¹⁵ According to an assessment by the Center for Strategic and International Studies (CSIS), half of the world's oil demand "will be met from countries that pose a high risk of internal instability" by the year 2020.¹⁶

This phenomenon exposes many developed countries to shortages of vital energy sources. Indeed, energy shortages are perceived as posing a threat to the national security of the United States, the European Union, Japan, and other developed nations. According to the present U.S. administration, this country "faces the most serious energy shortage since the oil embargoes of the 1970s."¹⁷

13. Wood et al., *supra* note 12.

14. HIROYUKI KATO, INT'L ENERGY AGENCY, WORLD ENERGY INVESTMENT OUTLOOK: 2003 INSIGHTS 30 (2003).

15. CENTER FOR STRATEGIC AND INT'L STUDIES (CSIS), EXECUTIVE SUMMARY: THE GEOPOLITICS OF ENERGY INTO THE 21ST CENTURY—REPORT OF THE CSIS STRATEGIC ENERGY INITIATIVE, at xvi (2000).

16. *Id.* at xvii.

17. NAT'L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY: REPORT OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP viii (2001) [hereinafter NATIONAL ENERGY POLICY]. While experts disagree as to precisely *when* world oil production will peak, they are in general agreement that sooner or later this peak *will* occur. Estimates for world oil peak production range from 2004 to 2112, with a mean estimate of about 2037. The timing debate is essentially a dispute over the size of the world's endowment of recoverable oil—an amount consisting of global cumulative production, remaining reserves, reserve growth, and undiscovered resources. THE

Estimates indicate that over the next twenty years, U.S. oil consumption will increase by thirty-three percent, natural gas consumption by as much as fifty percent, and demand for electricity will rise by forty-five percent.¹⁸ The implications of such increases in energy consumption are ominous.

Fifth, even appreciating the 1974 Agreement on an International Energy Program (IEP),¹⁹ the 1992 United Nations Framework Convention on Climate Change (UNFCCC),²⁰ and perhaps the Energy Charter Treaty of 1994 (ECT),²¹ the global response to the energy crisis has been unsatisfactory.

In this context, the Kyoto Protocol of 1997 (Kyoto) responds to the danger of global warming caused by anthropogenic actions and requires reductions of carbon dioxide emissions. Unfortunately, Kyoto almost totally disregards the need to find alternative sources of energy that can supply the burgeoning energy needs of the world. Not surprisingly, even parties to Kyoto have recognized the absence of suitable alternatives and balked at cutting down on coal. The sidelining of Kyoto has been foreshadowed by the emerging consensus among the scientific community that the reports of the Intergovernmental Panel on Climate Change (IPCC) significantly overestimated the extent and availability of alternative sources of primary energy that could fill the energy gap created by reductions in the use of coal and other hydrocarbons.²² The recent decision of Russia to ratify Kyoto may breathe some life into it, but does not alter the fact that Kyoto fails to address the looming energy deficit by identifying and developing new sources of energy.

Sixth, the search for smart energy that is plentiful, efficient, and accessible to replace or supplement our present environmentally damaging fossil fuel sources will involve new technological developments and creative assumptive frameworks dealing, *inter alia*, with energy production, distribution, delivery,

ARLINGTON INSTITUTE, A STRATEGY: MOVING AMERICA AWAY FROM OIL 29 (2003), *available at* <http://www.arlingtoninstitute.org/library/A%20Strategy%20-%20Moving%20America%20Away%20from%20Oil.pdf>. In a probabilistic assessment study released in 2000, the USGS estimated this endowment at approximately three trillion barrels of oil. *See* WORLD PETROLEUM ASSESSMENT 2000, *supra* note 10. On the flip side of the debate, experts who disagree with this estimate generally posit the amount as being much closer to 2 trillion barrels. THE ARLINGTON INSTITUTE, *supra*; *see also* WORLD PETROLEUM ASSESSMENT 2000, *supra* note 10, Table 2. The world's total oil demand is projected to increase from 76.0 million barrels per day in 2001 to 123 million by 2025. To meet this growth in demand, worldwide refining capacity is expected to increase from 81.2 million barrels per day in 2002 to almost 133 million barrels per day by 2025—an expansion of sixty-four percent. AEO2003, *supra* note 6, at 52–54.

18. *See* NATIONAL ENERGY POLICY, *supra* note 17, at x.

19. INT'L ENERGY AGENCY, AGREEMENT ON AN INTERNATIONAL ENERGY PROGRAM 14 I.L.M. 1 (1974), *available at* <http://www.iea.org/Textbase/about/IEP.PDF>.

20. UNITED NATIONS, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 31 I.L.M. 849 (1992), *available at* <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC].

21. The Energy Charter Treaty, Dec. 12, 1996, 34 I.L.M. 381. *See* discussion *infra* Part IV.

22. Hoffert et al., *Technology Paths*, *supra* note 2, at 981.

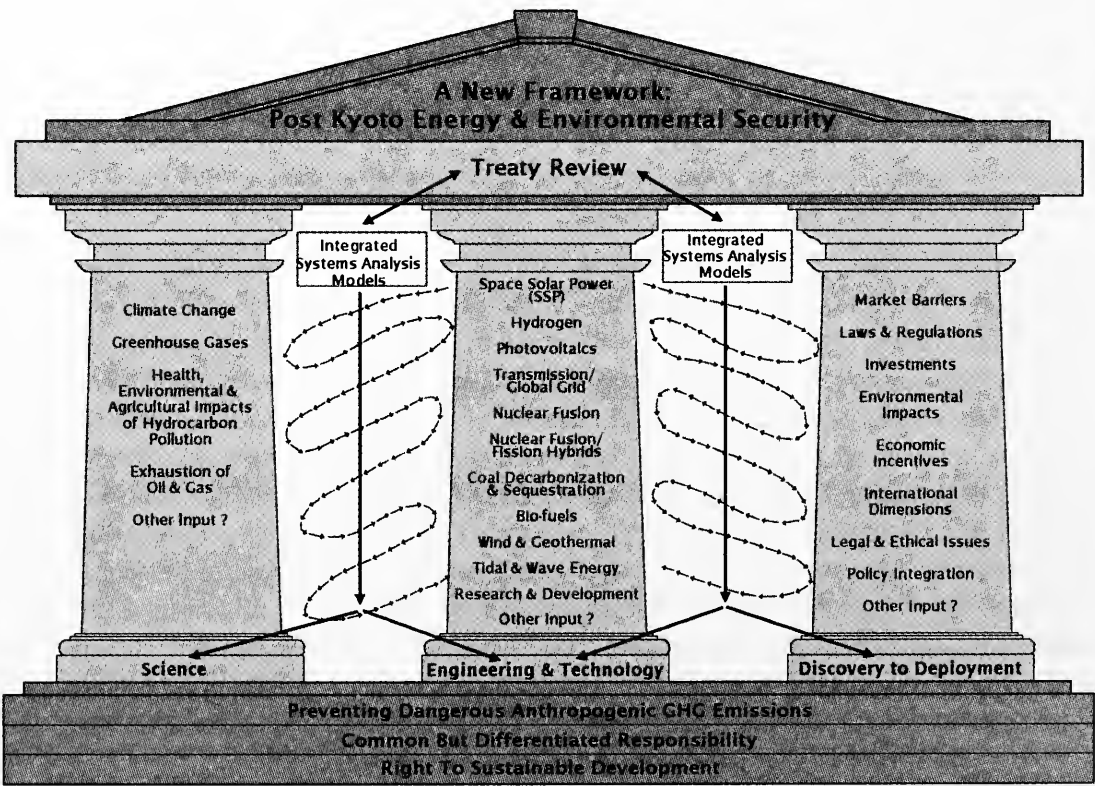
storage, conversion, end uses, and environmental protection. These technologies and assumptive frameworks need to be assessed and expressed in a manner which facilitates and secures global, national, and multinational corporate responses.

II. A PRELIMINARY CONCEPTUAL STRUCTURE

The relevance and appeal of any international instrument, and the extent of its acceptance, will depend, in great measure, on the strength of its scientific, engineering, technological, legal, social, economic, and behavioral knowledge base and underlying analysis. For example, the instruments discussed in this paper must be multidimensional entities, and each of their facets will require specific expertise and entail diverse forms of analysis. Thereafter, the varying analytical strands based on fragmented knowledge blocks dealing with science, technology, markets, and deployment will need to be integrated and configured into a sociopolitical aesthetic that lends itself to treaty making. This kind of comprehensive analysis will involve a dynamic interactive process.

A preliminary attempt to provide a schematic of this process is conceptualized as a Greek temple.

CONCEPTUALIZED FRAMEWORK



The matters presented in the Doric columns of the figure must be critically evaluated by a broad spectrum of contributors and collaborators, including natural and physical scientists, social scientists, engineers, economists, philosophers, and lawyers. These experts must evaluate the various subjects enumerated in the three columns. Such an effort must entail a dynamic continuous assessment process for analyzing and exploring the components of the three columns.

A. Foundations and Science [Column One]

First, there is a need for fundamental scientific research on a number of questions referred to in Column One. Among the most important are those relating to the behavior and feedback of water vapor, clouds and their interaction with radiation, the importance of the stratosphere in the climate change system, and the oceans.²³ Uncertainties still exist about narrow and broad currents along coast lines. Moreover, many changes affecting climate occur within the individual components of the climate system, such as atmosphere, ocean, cryosphere, and land surface. These are compounded when there is coupling between them, for example, the interaction between atmosphere and ocean.

Second, any such assessment must include the possible climatic perils posed by various Green House Gases (GHGs), the health, environmental, and agricultural impacts of hydrocarbons, along with projections regarding both the finite nature of geologic reserves of oil and gas and how long these particular hydrocarbons may last in the face of increasing world demand. There is an abundance of scientific writing dealing with the environmental pollution caused from mining to final disposal of fossil fuels, and an even greater mass of literature dealing with global warming and climate change. Natural, physical, and atmospheric scientists can collaborate with distinguished research institutions and laboratories to synthesize and summarize such scientific findings.

B. Engineering Solutions and Markets [Column Two]

This endeavor must also include a technical review of engineering solutions either established or in progress, referred to in Column Two of the conceptual schematic.

1. Hydrogen.—Hydrogen holds promise as an ultra-clean, environmentally friendly, and secure energy option for the world's energy future. Hydrogen can fuel pollution-free internal combustion engines, reducing auto emissions by more than ninety-nine percent. The United States has focused on developing hydrogen production, infrastructure, and fuel cell technologies for vehicles that could eliminate dependence on oil. Apart from transportation applications, hydrogen could have broader use as a fuel of the future through stationary power generation and portable power systems that could be used in consumer

23. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: SYNTHESIS REPORT 188-92 (Robert T. Wilson et al. eds., 2001).

electronics.

The recent Draft Strategic Plan (DSP) of the U.S. Department of Energy (DOE) cogently argued and concluded that the challenge posed by energy insecurity should be addressed by developing technologies that foster a diverse supply of affordable and environmentally sound energy.²⁴ Thus, in addition to further research into alternative energy and advanced nuclear technologies, the DSP envisions developing technologies that will enhance the efficacy of exploration, development, and production processes for domestic oil fields.²⁵ The DSP also commits to developing new technologies for the DOE's Integrated Sequestration and Hydrogen Research Initiative. This initiative is a ten-year, \$1 billion collaboration between government and industry for the purpose of designing, building, and operating FutureGen, the world's first virtually zero-emission, coal-to-hydrogen power plant. FutureGen is also intended to serve as an international test facility for advanced carbon sequestration technologies.

Internationally, the United States envisions that the International Partnership for the Hydrogen Economy (IPHE)

will foster the implementation of cooperative efforts to advance research, development, . . . [and deployment] of hydrogen production, storage, delivery[,] and distribution technologies. The IPHE will also enhance collaboration on fuel cell technologies, common codes and standards for hydrogen fuel utilization and safety, and help to coordinate international efforts to develop a global hydrogen economy. The IPHE will seek to coordinate closely with the [IEA], as its work is an important complement to IPHE efforts.²⁶

The creation of a hydrogen economy faces many challenges and prevailing uncertainties. An array of difficulties on technological, economic, and infrastructural fronts could mean that the investments of today may not yield the hydrogen economy of tomorrow. Although hydrogen is the most abundant element in the universe, it is found primarily in compounds on earth. Thus, H₂ needs to be produced from diverse primary sources including natural gas, coal, nuclear power, and renewable resources, such as wind and solar. Today, "[p]er unit of heat generated, more CO₂ is produced by making H₂ from fossil fuel than by burning the fossil fuel directly."²⁷ In light of the problems encountered in producing and using hydrogen, it can emerge as the fuel of the future only if other sources of primary energy, such as renewables or nuclear power, can be harnessed to produce hydrogen more efficiently and safely.

24. DOE, STRATEGIC PLAN: PROTECTING NATIONAL, ENERGY, AND ECONOMIC SECURITY WITH ADVANCED SCIENCE AND TECHNOLOGY AND ENSURING ENVIRONMENTAL CLEANUP (DRAFT) 13 (2003), *available at* <http://strategicplan.doe.gov/Draft%20SP.pdf>.

25. *Id.*

26. DOE, Terms of Reference for the International Partnership for the Hydrogen Economy (Revised Draft) 1 (Oct. 31, 2003), *available at* http://www.eere.energy.gov/hydrogenandfuelcells/pdfs/rev_terms_ref_iphe.pdf.

27. Hoffert et al., *Technology Paths*, *supra* note 2, at 983.

Producing more primary energy offers a better solution to the energy and environmental problems of the world than one based on hydrogen alone. Finding better sources of primary energy will enable us to replace hydrocarbons, regardless of whether we do so through hydrogen. Consequently, it is necessary to explore the extent and feasibility of producing or harnessing more primary sources of energy such as solar, wind, ocean thermal, geothermal, tidal power, decarbonized coal, nuclear fission, nuclear fusion, and other hybrid technologies that could replace hydrocarbons and perhaps, though not necessarily, be used to produce hydrogen.

2. *Other Sources of Primary Energy.*—Despite possible shortcomings of hydrogen, it is difficult to refute its promise and the desirability of moving to a hydrogen economy. However, producing more primary energy based on renewable sources, as well as “new traditionals” (hydrocarbons stripped of their defects) offers a better transitional, as well as final, outcome to the energy crisis. As a transitional strategy, finding new sources of energy will ease the move to a hydrogen economy. In terms of a final outcome, new sources of energy will always be required to create hydrogen. Consequently, the development of new sources of primary energy will enable us to replace hydrocarbons while simultaneously moving toward a hydrogen economy.

In addition to evaluating the feasibility of producing hydrogen through renewable energy sources, the assessment must also canvass technologies that have the potential to facilitate an optimal hydrogen economy transition by significantly contributing to the availability and utilization of primary energy sources. A number of the candidate technologies referred to in the diagram include solar space power, decarbonization and sequestration of carbon dioxide from fossil fuels, nuclear fission, nuclear fusion, and fission-fusion hybrids. This aspect of the study must also traverse hydrogen production, storage and transport, superconducting electric grids, and energy conservation and efficiency.

For example, in examining solar space power, the technical review can assess the feasibility and strategic efficacy of utilizing space-based geo-engineering and wireless power transmission to capitalize on the unique attributes of space and provide energy on Earth. Of particular importance to the geopolitics of energy is the possibility of using satellites to beam solar energy to developing equatorial countries that might otherwise rely on fossil fuels. Such a prospect may be examined in this aspect of the project.

A comprehensive analysis of energy options conducive to the attainment of a hydrogen economy requires examining the potential for producing hydrogen with both nuclear fission and fusion. Such an analysis must also explore technologies and techniques capable of mitigating the adverse environmental impacts of fossil fuel utilization. In this vein, the assessment must evaluate the extent to which decarbonization and carbon sequestration can effectively remediate these impacts. The assessment will also explore the potential for conservation techniques and efficiency technologies to assist in meeting the energy demands of an increasingly voracious global population.

Third, the effort must address the market barriers (as distinct from technical

hurdles) in deploying technology and attracting investment.²⁸ Deployment refers to the commercial adoption, market viability, penetration, and societal acceptance of renewable energy technologies. There is a cluster of renewable energy technologies such as those harnessing wind energy that are now commercially viable. Others, including some of the new technologies referred to in Column Two, like fusion power reactors, may take many decades to come online. Present market barriers to the deployment of new renewable energy technologies must be identified, including high costs and financial barriers, issues of sunk costs, information barriers, transaction costs, price distortions, capital turnover rates, market organization, and regulations that may deter or delay deployment.

Fourth, this effort must address the extent to which organizational and technological infrastructure could reduce the time lines from discovery to deployment that can take up to six decades. The journey from invention through demonstration projects to commercially viable technologies and services capable of market penetration can be an arduous one. Organizationally, the length of time from discovery to market can be shortened by the extent and efficacy of horizontal networks that weave capital, knowledge, products, and talent.²⁹ Such an endeavor requires the active collaboration of governments, private firms, research institutions, financiers, suppliers, and consumers. The DOE's Integrated Sequestration and Hydrogen Research Initiative, referred to previously, may pave the way and provide a model for the sort of public and private collaboration required. There are other precedents for international collaboration offered by high-energy physics, nuclear fusion, and astronomy. Any large-scale effort must examine these and other collaborative ventures with a view to drawing up possible road maps for better organizing the process from discovery to market deployment.

On the technological front, the present hub and spoke energy transmission networks that form the grid system were designed for central power plants close to users. That is not the case with renewable energy which needs, in some cases, to be conveyed thousands of miles. For example, in the United States, the winds on the planes of North Dakota could make substantial contributions to the energy needs on either U.S. coast. However, the absence of necessary transmission lines and grids presently prevents the transfer of wind power from North Dakota to the Pacific or Atlantic Coast.³⁰

Moreover, while cost-effective photovoltaics and wind turbines may be expected to come online in the foreseeable future (and could also serve as catalysts for hydrogen production), they presently face formidable transmission problems due to their intermittent and dispersed character. It has been suggested that an advanced global electric grid is a possible alternative to conventional

28. INT'L ENERGY AGENCY, ENHANCING THE MARKET DEPLOYMENT OF ENERGY TECHNOLOGY 16 (1997).

29. George F. Gilboy, *The Myth Behind China's Miracle*, 83 FOREIGN AFF. 33, 41 (2004).

30. VACLAV SMIL, ENERGY AT THE CROSSROADS: GLOBAL PERSPECTIVES AND UNCERTAINTIES 277 (2003).

power distribution systems.³¹ Consequently, national grid systems may need to be re-engineered. Internationally, there is no global grid system that could ensure world-wide distribution of photovoltaic and wind, as well as, solar space power when available. Such a project must therefore examine the feasibility of re-engineering national and international grids.

C. Discovery to Deployment [Column Three]

The third column depicted in the schematic calls for a multi-tiered analysis of the legal, sociopolitical, and economic challenges of achieving a sustainable global energy future. As noted above, any such analysis must explicitly recognize and incorporate the need for economic strategies, incentives, and modalities for promoting both government and private investment in developing the science and technology necessary to making progress toward a clean energy future. This aspect of the project will also address the attendant questions of technology transfer and property rights. While the concept of sustainable development (SD) will provide the initial framework for dealing with these issues, it will be necessary to formulate a functional definition of SD insofar as it relates to energy and environmental security. The proffered definition of SD should also lend more specificity to the three interconnected foundational obligations established by the UNFCCC.

The technical and economic barriers to the deployment of renewable energy technologies are influenced by governmental decision making, and governmental regulation assumes importance. Government regulations dealing with economic incentives, taxes, charges, subsidies, licensing, research and development (R&D), conservation, and environmental regulations could encourage or discourage renewable energy. This effort must identify government regulations that have been successful in encouraging market deployment of renewable energy technologies.

R&D policies are referred to in Column Two and subsumed under Governmental Regulations in Column Three, and the importance of R&D merits special discussion. The required investment in R&D for the technologies referred to in Column Two, especially space solar power, fission, and hydrogen, will run into billions of dollars. Almost all energy technologies are developed and sold by corporations in the private sector. Technologies accelerated by government research, such as gas turbines, commercial aircraft, spaceflight, radar, lasers, integrated circuits, satellite telecommunications, personal computers, fiber optics, and cell phones took less than multiple decades to move from invention to markets.³² While there is little doubt that government sponsored basic science and technology research is vital,³³ it is equally important

31. Hoffert et al., *Technology Paths*, *supra* note 2, at 984.

32. Martin L. Hoffert et al., *Response*, 300 SCI. 582, 583 (2003) (letter to the editor) (citing M.I. HOFFERT & S.D. POTTER, *ENGINEERING RESPONSE TO GLOBAL CLIMATE CHANGE* 205-59 (R.G. Watts ed., 1997)).

33. *Id.*

to recognize the critical role of private capital and private research. Difficult questions persist about the extent, stage, character, and form of focused government R&D expenditures and how they interface and might be synthesized with private research.

III. REMAINING QUESTIONS

The forgoing offers a preliminary, not final, assessment. The final picture will emerge only after the integrated policy analysis and assessments are performed. The final stage of such a project will paint a comprehensive account of the scientific, technological, economic, engineering, and socio-legal contours of potential primary energy sources that might also be used to facilitate the development of a hydrogen economy.

The interdisciplinary assessment at that point can focus on the identification and analysis of general and specific solutions to the broad array of issues and problems implicated by transition scenarios to a non-hydrocarbon, or even a hydrogen, economy.³⁴ This focus must be pursued within an integrated and interdisciplinary framework that spans the physical, chemical, biological, social and political sciences, as well as economics, engineering, and law. Overall, the assessment can include an evaluation of the strengths, weaknesses, costs, and environmental impacts implicated by such transition scenarios, and can offer informed conclusions on the extent to which renewable or other energy options are capable—or incapable—of adequately meeting the hydrogen challenge.

Numerous questions still abound. One such question asks who will sponsor these instruments. Other questions pertain to the number of countries involved as well as the subject matter of these instruments. The prospect of negotiating a global treaty in law-making assemblies that include almost all nations of the world, such as a Conference of the Parties under the UNFCCC, or a freestanding framework convention on energy, seems bleak. Comprehensive global agreements are notoriously difficult to negotiate and implement. It may be more feasible to consider drafting a targeted yet limited and functional instrument that includes OECD countries as well as stakeholder developing countries such as China and India. Science and technology as well as trade and investment agreements may be the easiest from a negotiating standpoint, but run the risk of fragmenting the necessary global response.

It is perfectly conceivable that targeted pragmatism may prevail over comprehensive idealism. Consequently, an ambitious protocol encompassing all sources of energy may prove to be too complex. Instead, consensus may form around a more narrowly tailored protocol that, for example, focuses only on decarbonization and sequestration, space solar power, or fission-fusion hybrid technologies. The statute of the International Atomic Energy Agency (IAEA)³⁵

34. See generally DOE, A NATIONAL VISION OF AMERICA'S TRANSITION TO A HYDROGEN ECONOMY—TO 2030 AND BEYOND (2002); DOE, NATIONAL HYDROGEN ENERGY ROADMAP (2002).

35. The Statute of the International Atomic Energy Agency, Oct. 26, 1956, 8 T.I.A.S. 3873 (1957).

stands out as a precedent setting treaty that deals with just one source of energy: civilian nuclear power. Numerous treaties addressing differing aspects of nuclear power have been negotiated under the aegis of the IAEA. More recently the United States has created an International Partnership for the Hydrogen Economy (IPHE)³⁶ with fifteen partners, including the European Commission and India, for advancing Hydrogen R&D. The particular content and scope of the proposed draft energy instrument will depend on unfolding scientific, technological, and geopolitical developments.

IV. LEGAL FOUNDATIONS AND TREATY REVIEW

A. Foundational Treaties

The task of facilitating the design and negotiation of new instruments is better undertaken if it is integrated with prior international endeavors, thus allowing for building upon strengths and avoiding weaknesses of the existing treaty overlay. Two existing treaties are of particular importance: the International Energy Program (IEP) and the UNFCCC. The United States is a party to both agreements.

The IEP was a response to the energy crisis of 1973–74 when the Arab oil embargo sent oil prices spiraling upward and left the major industrialized countries feeling very vulnerable. The rich industrial countries of the world, who were members of the Organization for Economic Cooperation and Development (OECD), responded with the IEP: a new international treaty aimed primarily at ensuring the adequate supplies of oil at affordable prices. The IEP created a new international organization, the International Energy Agency (IEA), as its implementing agency.

Ensuring the stability and security of oil supplies remains the primary objective of the IEA. This objective is supplemented by a number of environmentally significant long-term objectives pertaining to the conservation of energy, development of alternative sources of energy, and research and development of renewable energy. These environmental objectives have assumed much greater practical importance and led the IEA to create a number of Standing Groups and Working Parties dealing with different aspects of the energy environmental interface. The IEA has also facilitated a host of Implementing Agreements on a variety of renewable energy frontiers, including advanced fuel cells, photovoltaic power systems, hydrogen, and wind turbine systems.

Internationally, the IEA has become the primary functional engine for facilitating renewable energy research. However, the operational significance attached by the IEA to renewable energy does not arise from legally binding obligations created by the IEP. The renewable energy aims of IEP are hortatory, not mandatory, and remain secondary to its primary objective of securing reliable oil supplies. The IEP does not contain any legally binding obligations requiring

36. International Partnership for the Hydrogen Economy, at <http://www.iphe.net>.

the creation, transmission, or deployment of renewable energy to address today's energy and environmental insecurity. Moreover, it is essentially an organization of rich, developed nations. Its membership does not include developing countries, like China or India, who will become the greatest consumers of fossil fuels, and emit more carbon dioxide in 2015 than the combined emissions of IEP Parties. While the IEA has sought to include some developing countries in its Implementing Agreements, such countries remain invitees rather than peers, and lack parity of status with IEP members. Consequently, new international instruments in which developing countries are primary parties and stakeholders offer better vehicles for fulfilling the work begun by the IEA. Such new instruments could more sharply clarify and define the rather vague and amorphous renewable energy mandates of the IEP, and render them more specific and enforceable.

The Energy Charter Treaty (ECT)³⁷ was agreed to in 1994 with a view to establishing a legal framework to promote long term cooperation in the energy field. It came into force in 1998, seeks to provide a non-discriminatory legal foundation for international energy cooperation, and deals with investment protection, trade in energy, freedom of energy transit, and improvements in energy efficiency. The ECT has been ratified by nearly fifty countries, primarily in old and new Europe, and the now independent countries of the ex-Soviet Union. It is mainly focused on trade and investment and provides for protection of foreign investment, thus ensuring a stable basis for cross border investments among countries with differing social, cultural, economic, and legal backgrounds. Under its umbrella the parties negotiated a Protocol on Energy Efficiency and Related Environmental Aspects (PEERA) in 1998, which provides a platform for the cooperation in developing energy efficiency.

While the ECT has taken a step toward global energy cooperation, it does not specifically address how to develop primary sources of renewable energy, and the parties have been unable to agree on a Protocol dealing with renewable energy or the re-engineering of infrastructure. Moreover, the United States, China, India, Japan, and Australia are not parties to the ETC. It is important to carry the momentum of the IEP and ECT toward international agreements that include developing countries like China and India that will become the largest users of hydrocarbons.

The UNFCCC is a response to global climate change and contains a cluster of amorphous legal obligations.³⁸ It has the unique distinction of having been ratified by all the countries in the world. Three interlocking mandates are of special importance: (i) stabilization of greenhouse gases (GHGs); (ii) common but differentiated responsibility (CBDR); and (iii) the right to sustainable development. First, the UNFCCC requires all parties to stabilize GHG concentrations "at a level that would prevent dangerous anthropogenic interference with the climate system" within a time frame consistent with

37. The Energy Charter Treaty, *supra* note 21.

38. UNFCCC, *supra* note 20.

sustainable development.³⁹ The implications of this obligation are extensive. Coal, oil, and to a lesser extent natural gas, are the primary source GHGs implicated in climate change, and the obligation to stabilize GHGs requires the parties to create or find alternative or substitute sources of energy to replace potentially dangerous hydrocarbons and facilitate sustainable development.

This obligation is accentuated by the principles of “equity” and CBDR for protecting the climate system.⁴⁰ Equity and CBDR require developed countries to shoulder the primary responsibility and take the lead in combating climate change. Developed countries have, therefore, accepted a duty to create and share new technologies that use and enable non-climate changing sources of primary energy.

The first two sets of obligations interlock with a third: institutionalizing the right to sustainable development.⁴¹ The assertion that the “[p]arties have a right to . . . promote sustainable development [and] . . . that economic development is essential for adopting measures to address climate change”⁴² was an affirmation of the primary theme of the 1992 United Nations Conference on Environment and Development (UNCED). The primacy of sustainable and economic development was resoundingly re-asserted at the recently concluded 2002 World Summit on Sustainable Development.

These three legal obligations require developed countries, independent of their own energy predicament, to strive for a more diversified energy portfolio and place a duty on them to promote sustainable development in the developing world. A commitment to sustainable development requires the developed world to undertake fundamental R&D on new technologies for producing better forms of primary energy and transfer such technologies to developing countries.⁴³ The creation of new technologies will remove the threat of energy insecurity in developed countries, while their transfer to developing countries will promote sustainable economic and energy growth.

39. *Id.* at 854, art. 2.

40. *Id.* at 854, art. 3(1).

41. As set forth in the seminal Brundtland Report, sustainable development is described as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” *Report of the World Commission on Environment and Development: Our Common Future*, U.N. Environment Programme, 42d Sess., Agenda Item 83(c), at 43, U.N. Doc. A/42/427 (1987). The report further notes that “[i]n essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.” *Id.* at 46.

42. UNFCCC, *supra* note 20, at 854, art. 3(4).

43. In addition to other relevant provisions of the UNFCCC, Article 4(5) commits developed country Parties to “take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention.” *Id.* at 858, art. 4(5).

The major issues arising in this context pertain to the existence, availability and practicability of future sources of primary energy, the candidate technologies that offer feasible solutions to the energy and environmental crisis and, importantly, the manner and mode in which the technology will be deployed. The canvassing of promising new directions in innovative technologies able to exploit a variety of energy sources will form a vital element of the proposed knowledge base and also help to traverse the cobbled passage from invention to commercial deployment.

B. Treaty Review

The legal foundations laid by the treaties discussed above have been supplemented by hundreds of other bilateral and multilateral energy treaties of varying stripes. These treaties need to be analyzed with a view to ascertaining the extent to which energy treaties presently in force, as well as those forming their historical backdrop and context, that were entered into within the last fifty years, inform the legal foundations of the legal analysis.

The challenges facing renewable energy have been addressed with differing success, in a variety of ways, by the 192 countries of the world. Researching the individual responses of each country to determine how each nation responded to the suite of challenges it confronts is a Sisyphean, perhaps impossible, task. A number of these problems, nonetheless, are common to many nations of the world, who ought to have recognized their inability to solve them purely by their own endeavors. This realization should have led them into cooperative international agreements addressing these issues.

Whether they have done so remains to be determined by a comprehensive and legally searching treaty review. When properly analyzed, such international agreements will show how different countries have responded to common problems. They will offer a window to their countries' thinking because, to a considerable degree, treaties or agreements distill, re-state, and reduce the thinking of the parties to writing. A study of treaties thus becomes a felicitous and innovative way of garnering the world's common understanding and perception of the energy crisis and the attendant global responses.

One way of proceeding would be to divide the world into hubs and spokes and undertake a treaty review organized around the following geographic hubs: (1) United States; (2) International Energy Agency (IEA); (3) European Union (EU); (4) China; and (5) India. There are a range of international instruments dealing, *inter alia*, with renewable energy, R&D, trade and investment, science and technology, energy efficiency, energy conservation, energy transit, technology transfer, and energy markets.

A credible treaty review must examine all relevant energy treaties. Such an examination will form a valuable baseline from which to assess the future and determine the scope and subject matter of future international energy instruments. At an impressionistic level, it appears that the IEP and the ECT, referred to in Part IV.A, are among the more comprehensive multilateral treaties, while the other agreements are piecemeal efforts to deal with discrete questions on a case by case basis.

Such a treaty review must also examine a range of related and analogous international (government to government), transnational (private agreements crossing national boundaries), and corporate efforts addressing renewable energy, high energy physics, fusion, and space exploration to determine the most effective and efficient forms of international cooperation.⁴⁴

CONCLUSION

The treaty review outlined above constitutes the research agenda of the Energy & Environmental Security Initiative of the University of Colorado (EESI).⁴⁵ As previously explained, such an ambitious research venture calls for the construction of a knowledge base and analytical compass that together will facilitate the development and drafting of international energy instruments.

As currently envisioned, the principal objective of new energy instruments will be to facilitate the development of primary sources of energy—i.e., energy in its naturally occurring form—as well as energy conversion, transmission, and end-use distribution.⁴⁶ The research agenda delineated above seeks to advance the objective of promoting new treaties and other international instruments promoting sustainable energy. It seeks to do so by providing decisionmakers with a comprehensive scientific, engineering, economic, and socio-political knowledge base and policy compass that will illuminate pathways toward an integrated approach to the development and deployment of renewable energy through international instruments.

The research agenda presented in this Article builds upon research frameworks already delineated,⁴⁷ which are fostering the development of low greenhouse gas (GHG) global energy systems primarily by facilitating technology research. The present Article complements this process by introducing a comprehensive multi-disciplinary systems-based policy domain that integrates hitherto fragmentary scientific, engineering, and policy responses. The primary objective of such a policy domain will be to explore ways of institutionalizing and deploying new generation technologies being developed by other more scientifically driven and technologically grounded initiatives.

While this Article seeks to advance the negotiation of international accords necessary to meet future energy needs, it does not presume to legislate the scope, structure, specific subject matter, final terms, or norms of the proposed new energy instruments. Instead, it is intended as a starting point from which to begin

44. Importantly, such a treaty review has been initiated by researchers, including the author, at the University of Colorado at Boulder as part of the Energy & Environmental Security Initiative (EESI). See the EESI homepage, at <http://www.colorado.edu/law/eesi>.

45. For a more thorough description, see *id.*

46. The World Energy Council reports primary energy consumption for different countries based on rules for conversion of energy sources into primary energy. This accounting is a suitable method for comparing consumption of different energy sources in different countries.

47. See Franklin M. Orr, Jr., Global Climate and Energy Project, Stanford University (n.d.), available at http://gcep.stanford.edu/pdfs/gcep_white_paper.pdf.

the arduous interdisciplinary and collaborative work necessary to negotiate instruments ranging from science and technology agreements and Trade and Investment treaties to more ambitious regional treaties and overarching global conventions or protocols.

ARTICLE

TESTING THE STATES' RIGHTS SECOND AMENDMENT FOR CONTENT: A SHOWDOWN BETWEEN FEDERAL ENVIRONMENTAL CLOSURE OF FIRING RANGES AND PROTECTIVE STATE LEGISLATION

NICHOLAS J. JOHNSON*

The last decade has witnessed notable changes in the dialogue about gun rights. A majority of recent scholarship supports the view that the United States Constitution recognizes an individual right to possess firearms.¹ It is now the position of the United States Government that the Second Amendment protects an individual's right to arms.² The Fifth Circuit Court of Appeals has produced the most exhaustive analysis of the Second Amendment ever by a federal court and concluded that it guarantees an individual right.³ Professor Laurence Tribe, author of the influential treatise *American Constitutional Law*, has gone from dismissing the Second Amendment in a footnote to claiming that

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1. See Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 192-97 app. 1 (1997) (listing articles and books supporting the individual rights view of the Second Amendment); Don B. Kates, Jr., Editorial, *Right to Own Guns Has Scholarly Support*, NAT'L L.J., Apr. 12, 1993, at 12 (stating that the vast majority of law review articles published since 1980 on the Second Amendment adopt an "individuals'-right view"). But see Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 385 app. (2000) (arguing that a count starting from 1900 generates a nearly even split between scholars). A running list of law journal articles treating the Second Amendment appears at <http://www.saf.org/AllLawReviews.html>.

2. See *Silveira v. Lockyer*, 312 F.3d 1052, 1065 n.14 (9th Cir. 2002) (discussing Brief for the United States in Opposition to Petition for Certiorari at 19 n.3, *United States v. Emerson*, 270 F.3d 203 n.3 (5th Cir. 2001) (No. 01-8780), available at <http://www.usdoj.gov/osg/briefs/2001/Oresponses/2001-8780.resp.pdf>). The individual right perspective represents a reversion to the Government's historic position. See Dave B. Kopel, *An Army of One*, NAT'L REV. ONLINE, May 29, 2001, available at <http://www.nationalreview.com/kopel/kopelprint052901.html> (showing that Attorneys General from the administrations of Andrew Jackson and Abraham Lincoln through Franklin Roosevelt took the individual rights view).

3. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

it guarantees an individual right.⁴ Even Senator Charles Schumer, long a vigorous opponent of gun rights, claims to believe that Americans have a constitutionally protected right to individual firearms.⁵

Of course, there remains opposition to the individual rights view. Support for it in the legal academy is by no means unanimous.⁶ More importantly, the position of most lower federal courts is and has been that the Second Amendment only protects an amorphous state right to arms. These decisions declare effectively that individual Americans could be constitutionally disarmed if Congress developed the will to do it.

Scholars have criticized the states' rights Second Amendment (SRSA) on a number of fronts: that it rests on early spurious lower federal court interpretations of the Supreme Court's single direct treatment of the Second Amendment, *United States v. Miller*,⁷ rather than on *Miller* itself;⁸ that it is difficult to square the SRSA with the text of Article I, Section 8⁹ and Article I,

4. See Christopher Chrisman, Note, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439, 441-42 (2001) (describing the shift in Professor Tribe's view from the previous to current edition of his treatise).

5. See Gilbert Cranberg, Editorial, *Ashcroft Is Dogged in Reshaping Bill of Rights*, DES MOINES REG., June 22, 2002, at 11A (Senator Charles Schumer, New York Democrat: "While some may not believe it, I believe in the Second Amendment. I do not agree with those who think the Second Amendment should be interpreted almost in a nonexistent way just for militia."). It is unclear whether the Senator would say this is a change of position. He certainly championed the states' rights position advanced by Handgun Control Inc.'s Dennis Henigan, when two colleagues and I testified before him in 1995. See *The Second Amendment and the Need for Congressional Protection: Testimony Before the House Comm. on Judiciary, Subcomm. on Crime*, 104th Cong. (Apr. 5, 1995) (statement of Robert J. Cottrol, Raymond T. Diamond and Nicholas J. Johnson), available at 1995 WL 151923; *Statement of Dennis A. Henigan, General Counsel, Handgun Control, Inc., Before the House Comm. on Judiciary, Subcomm. on Crime*, 104th Cong. (Apr. 5, 1995), available at 1995 WL 150025.

6. Some scholars would even contest the assertion that the standard model is shared by most constitutional scholars. If we count constitutional scholars generally, rather than just those who have studied and written about the Second Amendment, the individual rights view might not be the dominant position.

7. 307 U.S. 174 (1939).

8. See, e.g., Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 962-63 (1996) [hereinafter Denning, *Can the Simple Cite Be Trusted?*]. See also David B. Kopel, *The Supreme Court's Thirty-five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999) (suggesting that the Court has not been as silent on the Second Amendment as some claim).

9. See U.S. CONST. art. I, § 8, cl. 15-16 (assigning to the federal government the power of "calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers and the Authority of training the Militia according

Section 10¹⁰ of the Constitution; and especially that it has been given no positive content, but is merely a makeweight used to reject individual rights claims.¹¹ Nonetheless, lower federal courts hew to the states' rights view. What has been lacking is a concrete test of whether the SRSA is more than just the residue of rejected individual rights claims. That is what I propose to test here.

What could it mean to protect a state's right to keep and bear arms? Some things seem too outlandish to gain much traction. One of the policy criticisms of the SRSA is that it appears to protect the establishment of independent state armies. Some have argued that this possibility makes the SRSA theoretically more dangerous than the individual rights view. (Imagine Arkansas circa 1955 with its own heavy artillery and air power). Still, the danger seems remote. Gun crime by individual perpetrators is real and present. It is understandable that those who see lawful ownership of firearms as a driving factor in gun crime might accept the theoretical danger of an Arkansas Air Force in exchange for the ostensible benefits of banning private firearms.¹² Short of a controversy over the legitimacy of the Arkansas Air Force, it has been difficult to consider circumstances that would put the SRSA to the test.

This Article poses a practical test to plumb the content of the states' rights view—a test that does not depend on the seemingly remote showdown of muscle. Rather I suggest a conflict of bureaucracies that already has emerged, though it has not fully matured: a conflict between federal environmental legislation that is violated by the deposit of discharged lead projectiles and state legislation protecting the primary places where the people actually bear arms—shooting ranges.¹³

All across America, individuals practice the art of the gun at ranges that are, to various degrees, sanctioned, supported, and protected by state legislation, regulation, and dollars. They are the primary places where citizens gather in groups to learn and practice gun safety and develop proficiency. Millions of rounds per year are fired at non-military shooting ranges.¹⁴ Ranges provide general firearms training, youth gun safety training, hunter qualification classes, organized competition, and promote recreational shooting. Many of these ranges

to the discipline prescribed by Congress”).

10. See U.S. CONST. art. 1, § 10 (“No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . .”).

11. See Denning, *Can the Simple Cite Be Trusted?*, *supra* note 8.

12. I say ostensible benefits here to acknowledge the debate over the utility of gun regulations that prevent law-abiding citizens from owning or carrying firearms. See, e.g., Gordon Witkin, *Should You Own A Gun*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 24, 30 (describing the research of Gary Kleck and Arthur Kellermann).

13. Though it is perhaps the ultimate conflict, our dispute over the manner and rate of consumption of the biosphere presents a less acutely dangerous context in which to examine whether the states' rights view is more than a makeweight.

14. See EPA, BEST MANAGEMENT PRACTICES FOR LEAD AT OUTDOOR SHOOTING RANGES, at I-1 (Jan. 2001) (EPA-902-B-01-001) [hereinafter EPA, RANGE BMPs], available at <http://www.epa.gov/region02/waste/leadshot/download.htm>.

operate in partnership with the federal government through the longstanding Civilian Marksmanship Program (CMP), which sponsors participation in the United States Army high-power rifle course of fire and sales of surplus, semiautomatic battle rifles to qualifying civilian participants and clubs.¹⁵ While hunters sometimes fire guns in their often solitary pursuit, the range is where the community of armed citizens comes together and where core principles of an armed citizenry are communicated.¹⁶

It is instructive then to consider the manner in which federal environmental legislation threatens ranges, and the methods that states have and might further protect ranges from claims that shooting is incompatible with modern environmental and aesthetic sensitivities. If the states' rights view has any real substance, those who tender it must grapple with the idea that states can trump powerful federal environmental statutes with range protection legislation grounded in the SRSA.

But activating the SRSA will require more than legislation declaring ranges immune from lead pollution liability. The scattered doctrinal guidance offered by states' rights judges over the years demands a more explicit militia-centered invocation of the SRSA. How precisely states choose to invoke the SRSA to pursue their already established goals of range protection may vary. But one predictable approach is adding to existing range protection measures a state CMP that tracks the federal program.

This effort to satisfy the requirements of the SRSA would also have another effect. In addition to furthering range protection, it would protect a variety of other things, some of which strike at the heart of gun control policies dear to those who advance the SRSA. By forcing states to reinforce existing range protection measures with a CMP-type structure, the SRSA triggers a test of its own content and unleashes doctrinal and policy problems that some have bet would never arise.

Part I describes the federal environmental threat to shooting ranges. Subparts A through D offer a detailed treatment of the environmental legislation that is summarized at the beginning of Part I. Part II distills the lower federal courts' state centric view of the Second Amendment. Part III sets up and critiques the conflict between a state centric Second Amendment and federal environmental regulation. Part IV assesses the politics and policy implications of range protecting state CMPs.

15. See *infra* notes 137-45 and accompanying text.

16. The starting rules are:

All guns are always loaded.

Never let the muzzle cover anything you are not willing to destroy.

Keep your finger off the trigger until your sights are on the target.

Be sure of your target.

JEFF COOPER, *THE ART OF THE RIFLE* 15-16 (1997).

I. THE FEDERAL ENVIRONMENTAL REGULATORY THREAT TO FIRING RANGES

The discharge of firearms can trigger literal violations of three federal environmental statutes: The Clean Water Act (CWA),¹⁷ the Resource Conservation Recovery Act (RCRA)¹⁸ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund").¹⁹ Environmental Protection Agency (EPA) policy has been, up to now, fairly consistent under each of these statutes. While the discharge of firearms might technically violate all three, EPA has exercised its discretion to set enforcement priorities in a fashion that has left ranges relatively unimpaired.²⁰

Because environmental statutes are written very broadly, it is fairly common and administratively necessary for EPA to establish a hierarchy of enforcement priorities. For example, EPA has determined that individual households who undeniably fit the technical definition of responsible parties under the Superfund law are exempt from liability on the basis that the volume of hazardous substances they discharge is generally *de minimus*.²¹ Similarly, under the CWA, any discharge of a pollutant into "waters of the United States" without a permit is a technical violation of the Act.²² Thus, the thousands of young swimmers who urinate in recreational waters each year have technically violated the CWA,²³ but have not been enforcement priorities. On the other hand, the millions of head of livestock who do essentially the same thing have received very close EPA scrutiny and are subject to detailed regulations.²⁴ Firing ranges have been treated within this framework. Wherever one might think firing ranges should fit in the hierarchy of priorities, they have up to now appeared to row appeared fairly low.

But ranges have not been entirely ignored. Ranges vary in their

17. 33 U.S.C. §§ 1251-1387 (2000).

18. 42 U.S.C. §§ 6901-6992k (2000).

19. *Id.* §§ 9601-9675.

20. Often this involves determinations that activity is *de minimus* or not within EPA's discretionary, regulatory jurisdiction, as opposed to its typically broader statutory jurisdiction. *See, e.g., infra* note 54.

21. On Jan. 11, 2002, President Bush signed H.R. 2869, the Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118, which contains significant relief from CERCLA liability for eligible small businesses and nonprofit organizations for generation of municipal solid waste (MSW). This legislation basically provides CERCLA liability relief to mom-and-pop businesses and schools. In some respects, it codifies EPA's February 5, 1998, MSW policy of generally exempting small generators of MSW. However, EPA's MSW policy did not prevent private party claims against such entities. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996); *B.F. Goodrich v. Murtha*, 958 F.2d 1192 (2d Cir. 1992). Through the Small Business Liability Relief Act, Congress has exempted these small generators from private party actions.

22. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

23. *But see United States v. Plaza Health Labs., Inc.*, 3 F.3d. 643, 647 (2d Cir. 1993).

24. *See* 40 C.F.R. §§ 122.1-122.23 (2004) (regulating concentrated animal feeding operations).

environmental impact. High-use commercial ranges have different environmental impacts than small club facilities. As discussed below, the Remington Arms facility on Long Island Sound was one of the first ranges closed by federal environmental law. But most ranges are not as elaborate as the Remington facility, and in many instances, EPA can make a sound environmental decision that the range presents a technical violation but no real environmental threat.²⁵

But EPA is not the sole steward of the broad environmental protections Congress has established over the past three decades. All the statutes discussed here contain citizens' suit provisions permitting some type of private party enforcement.²⁶ The significance of these provisions is highlighted in the EPA guidance document Best Management Practices for Lead at Outdoor Shooting Ranges (Range BMPs):

Citizen groups have been the driving force behind most legal actions taken against outdoor ranges. These groups have sued range owners/operators under federal environmental laws. Two of EPA's most comprehensive environmental laws, the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA), specifically provide citizens with the right to sue in cases in which the environment and human health are threatened. *These citizen suits have been highly effective in changing the way ranges operate*, even when out-of-court settlements have been reached.²⁷

These citizens' suit provisions differ in the details, but broadly speaking, they authorize private party actions for statutory (and sometimes regulatory) violations EPA has not pursued. Thus, even a firing range EPA deems to have little environmental impact may be restricted or closed by actual or threatened private party litigation attacking technical violations of federal law.

A. Clean Water Act Litigation Against Ranges

The CWA prohibits any discharge of *pollutants* from a *point source* into

25. This decision presents an across the board political problem. When EPA makes determinations of safety in any context, it is a relative one and a political one. For example, a commonly stated safe level of exposure to toxics is one-in-one-million risk of cancer. It is a purely political determination that this is an acceptable risk. For the one in a million person who loses this bet, the exposure level clearly is not safe. But if pushing the risk to zero requires elimination of certain beneficial economic activities, like the production of steel or paper, we quickly understand why regulatory exposure levels establish acceptable risk rather than total safety.

26. CERCLA contains provisions allowing private party polluters to seek compensation from contributing polluters and cost recovery where the private plaintiff is not a polluter. See 42 U.S.C. §§ 9607-9613 (2000). Its explicit citizen's suit provision, 42 U.S.C. § 9659, is newer, seems more limited, and has been less widely utilized than the provisions under RCRA and the CWA.

27. EPA, RANGE BMPs, *supra* note 14, at I-6 (emphasis added).

waters of the United States without a permit.²⁸ It defines pollutant broadly to include even foreign rock, sand or dirt.²⁹ At its most extreme, pollutant has been defined to capture New York City's introduction of Hudson River water into a reservoir holding cleaner water from the Catskills watershed.³⁰ Lead projectiles and clay targets used at trap, skeet, and sporting clays ranges, therefore easily trigger a violation of the CWA if they come to rest in waters of the United States.

As a result of years of jurisdiction expanding litigation, "waters of the United States" is defined so broadly that the CWA applies even where there is no water. In litigation over the Army Corp of Engineers' jurisdiction to protect "wetlands" (land that supports plants that only grow in areas periodically inundated by water) under section 404 of the CWA, courts have defined "waters of the United States" to include places that often are totally dry.³¹ A recent Supreme Court decision concluding that wetlands truly isolated from flowing waters of the United States cannot be brought within Congress's jurisdiction merely through the presumption that they are used by migratory birds in flight across state lines has diminished the reach of the CWA somewhat.³² However, thousands of ranges still impact undeniable waters of the United States and adjacent wetlands.

The model "point source" of pollution is a pipe running from a factory and discharging into a river. While there is authority holding that humans cannot themselves be point sources³³ (maybe excluding the urinating swimmer), the concept generally has been interpreted so aggressively that the barrel of a gun easily can be made to fit within the definition of point source.

The citizens' suit provisions of the CWA were successfully invoked against a trap and skeet range in *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club*.³⁴ In compliance with United States Fish and Wildlife Service (USFWS) regulations, the NYAC range had switched from lead shot (deemed toxic by USFWS) to steel shot. However, the court found that even non-toxic steel shot, along with clay target debris, falls within the CWA's broad definition of pollutant.³⁵ The court also found that the target throwing machines, the shooting platforms, and the range itself were point sources of discharge into waters of the United States and enjoined the un-permitted operation of the

28. 33 U.S.C. § 1362(12) (2000). The statute itself refers to "navigable waters" but this has been interpreted to mean more broadly, "waters of the United States." See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

29. 33 U.S.C. § 1362(6).

30. See *Catskill Mountains Chapter of Trout Unlimited, Inc., v. City of New York*, 273 F.3d 481, 491-92 (2d Cir. 2001).

31. See, e.g., *Riverside Bayview Homes, Inc.*, 474 U.S. at 130 (defining "wetlands" subject to the CWA's jurisdiction).

32. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

33. See *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993).

34. No. 94 Civ. 0436 (RPP), 1996 WL 131863 (S.D.N.Y. Mar. 22, 1996).

35. *Id.* at *15.

range.³⁶

*Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*³⁷ is discussed below for the example it provides about citizen's suits under RCRA.³⁸ But it also adds something to our understanding of CWA citizens' suits. The CWA claim in *Remington Arms* technically was dismissed because the CWA requires citizens to show that there is a *continuing violation* of the Act in order to sustain their claim. By the time of the litigation, the range had closed.³⁹ However, as suggested in EPA's Range BMPs the pre-litigation dynamic may be typical. There are virtually no defenses under the CWA. Faced with invocations of the CWA, ranges have few options and may concede the fight before it ever really starts.⁴⁰

Perhaps more foreboding for ranges subject to CWA jurisdiction is the long-term assessment in EPA's Range BMPs. Prominent at the beginning of the document is the disclaimer that the guidance creates no substantive or procedural rights, even for ranges that follow the recommended BMPs. Still, the guidance urges that ranges should manage spent lead projectiles toward the end of recycling. If done properly, this *might* avoid violations of RCRA and CERCLA, but the CWA is another matter. The Range BMPs warn that "shooting into water bodies or wetlands is NOT an option for ranges that want to survive in the future."⁴¹

B. Resource Conservation Recovery Act Litigation Against Ranges

It is uncommon for sophisticated parties to raise a credible defense that a regulatory program is just too complicated to be enforced, but RCRA has generated exactly that. In *United States v. White*,⁴² the defendant made a powerful vagueness argument presenting, among other things, the view of an EPA Assistant RCRA Administrator that only five people in the Agency really understand the core definition, "hazardous waste," that drives the entire

36. *Id.* at *14.

37. 989 F.2d 1305 (2d Cir. 1993).

38. See *infra* notes 59-61 and accompanying text.

39. *Remington Arms*, 989 F.2d at 1312.

40. See EPA, RANGE BMPs, *supra* note 14, at I-6 (noting the effectiveness of citizens' suits in modifying range activity even where settlements have been reached). Individual shooting at private sites or shots taken while hunting also might be technical violations of the CWA. I give less attention to this scenario. While it might produce a later generation of the conflict I posit here, it is a more tenuous plaintiff's claim, presents a less immediate threat to bearing arms, and is less likely to generate a state legislative response any time soon. While such a case would permit an interesting defense under the individual rights view of the Second Amendment, it is the States' rights view I am interested in here, and the best test of that is direct state/federal conflict.

41. *Id.* at II-4 (emphasis in original). This guidance was developed initially by EPA Region II, and subsequently adopted as National Guidance.

42. 766 F. Supp. 873 (E.D. Wash. 1991).

regulatory program.⁴³ Parsing the statute and the regulations is, in the words of then Judge Starr, a “mind-numbing journey.”⁴⁴ Fortunately, we do not need to understand all of its complexities in order to appreciate RCRA’s threat to firing ranges.

RCRA is a regulatory statute. It is designed to enable and sometimes prompt EPA to develop a “cradle-to-grave” scheme regulating hazardous wastes. The statute takes up about a quarter inch of U.S. Code. The regulations comprise three thick volumes of the Code of Federal Regulations.⁴⁵

RCRA has been subject to much criticism. The Reagan administration found it far too expensive and under-enforced it.⁴⁶ But, objections to RCRA are not

43. Defendant elicited the following observation from Don R. Clay, EPA Assistant Administrator for the EPA Office of Solid Waste and Emergency Response:

RCRA is a regulatory cuckoo land of definition. [RCRA] is *very* complex. I believe we have five people in the agency who understand what “hazardous waste” is. What’s hazardous one year isn’t—wasn’t hazardous yesterday, is hazardous tomorrow, because we’ve changed the rules. You have a waste that in one state is hazardous and in another isn’t because they haven’t adopted a rule yet. It is a legal statutory framework rather than logical, based on concentration and threat type of thing.

Id. at 882. The defense failed because the particular violation was uncommonly easy to perceive through the mire of jargon and counterintuitive definitions.

44. *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987). The confusion begins immediately with a statutory definition of solid waste that includes some liquids and gases. *Id.*; *see also* 42 U.S.C. § 6903(27) (2000). Whether a solid waste is really disposed of (and thus another step toward being regulated) is complicated by the paradox that Congress sought to encourage recycling (because it reduces waste) and that EPA often desires to regulate recycling (because recycling can produce environmental hazards). *Am. Mining Cong.*, 824 F.2d at 1189. Consequently, EPA has produced a set of extraordinarily complex rules that control when reuse or recycling of certain materials is exempt from RCRA and when it is regulated. *Id.* Finally, the set of rules that govern whether the discarded solid waste is also hazardous requires both a lawyer and a chemist (hazardousness depends in part on the result of chemical tests to determine if the waste manifests characteristics like corrosivity, ignitability, reactivity, or toxicity) to decipher. This short description is a gross oversimplification of the complexity of RCRA.

45. RCRA is one of the more striking examples of Congress delegating away essentially full lawmaking powers. If only five people in EPA understand RCRA regulations, it is a safe bet that no one elected to Congress does. Sadly, this seems all too common. *See* Jacob Sullum, *Blindman’s Rule*, reasonline (Feb. 21, 2003), at <http://www.reason.com/sullum/022103.shtml> (commenting sarcastically that many in Congress who voted for McCain-Feingold campaign finance reform seem shocked to learn how it actually operates and speculating how often members of Congress vote on bills they fail to read).

46.

The early implementation of the RCRA regulatory program was characterized by turmoil. The Reagan Administration, which assumed office in January 1981, targeted the RCRA program as excessively costly. The EPA attempted to nullify or weaken some of the regulations that had already taken effect, and in some cases was forced to reinstate the original regulations . . . causing confusion, uncertainty, and the appearance

entirely political or economic. RCRA over-regulates in the sense that it fails to make detailed distinctions between risks posed by different grades of hazardous waste (you are either in or out).⁴⁷ It also under-regulates through the creation of numerous exceptions. For example, the various poisons that appear in household waste are exempt from RCRA's strenuous hazardous waste disposal requirements. This hazardous household waste continues to go to landfills, many of which will leak and become future hazardous cleanup problems.

RCRA liability hinges on two threshold questions. First, is a substance actually a "solid waste" and is it "disposed of?" This first basic question remains the subject of much conflict.⁴⁸ Second, is the substance (once deemed a solid waste) actually hazardous. Wastes are hazardous for basically two reasons: either they appear on one of EPA's lists of hazardous wastes,⁴⁹ or they exhibit hazardous characteristics of ignitability, corrosivity, reactivity, or toxicity.⁵⁰ The toxicity characteristic is only relevant for a limited number of substances including lead. A discarded substance containing lead is tested to determine whether it will leach enough lead to kill test organisms within a specified period. If so, the waste fails the toxicity characteristic and falls within RCRA's regulatory net.

Like many regulatory agencies post *Chevron*,⁵¹ EPA has broad discretion to interpret its enabling statute, draft consistent regulations, and set regulatory priorities. Within this range of discretion, EPA might deem lead projectiles themselves to be the regulated waste, or the mixture of receiving media (berm soil or sediment) and projectiles to be the regulated waste. Depending on that choice, the outcome of the toxicity testing and EPA's regulatory strategy for ranges, the results might vary. Currently, EPA guidance for outdoor shooting ranges focuses on management practices that permit lead reclamation and recycling with an eye toward future development of non-toxic projectiles.⁵²

of mismanagement. Ultimately, the EPA administrator, Anne Gorsuch, resigned and her Assistant Administrator responsible for the RCRA and CERCLA programs, Rita Lavelle, was ridiculed and convicted of perjuring herself before Congress.

MAXINE I. LIPELES, ENVIRONMENTAL LAW, HAZARDOUS WASTE 4 (3d ed. 1997).

47. William F. Pedersen, Jr., *The Future of Federal Solid Waste Regulation*, 16 COLUM. J. ENVTL. L. 109, 120-21 (1991).

48. This is understandable. Once a waste falls into RCRA, the price of disposal increases dramatically. Moreover, even after disposal at a hazardous waste facility, the paper trail RCRA creates exposes the discharger to subsequent potential liability under Superfund. Since "disposal" is a decision partly controlled by the waste producer, EPA has worried that everything from beneficial recycling to outright scams will permit hazardous waste to escape regulation. Litigation about the true meaning of disposal is the natural outcome. *See Am. Mining Cong.*, 824 F.2d at 1180 n.1.

49. *See* 40 C.F.R. § 261.31-33 (2004).

50. *Id.* § 261.21-24.

51. *Chevron U.S.A., Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

52. EPA notes that the U.S. Fish and Wildlife Service phased in a ban of lead shot for waterfowl hunting over the period 1986-1991. EPA, RANGE BMPS, *supra* note 14, at app. B. Steel,

However, like the CWA, RCRA includes citizens' suit provisions that allow private parties to force litigation even where EPA has deemed firing ranges a low priority.⁵³ In *Connecticut Coastal Fisherman's Ass'n v. Remington Co.*, plaintiffs claimed that operation of the Remington shotgun range constituted disposal of hazardous waste without a treatment, storage, or disposal ("TSD") permit.⁵⁴ The district court ruled that the lead shot and clay targets were RCRA solid wastes, that the lead shot was a hazardous, and declined to rule on whether the clay target debris was hazardous.⁵⁵

On appeal, the Second Circuit requested a post-argument amicus brief from EPA on whether normal firing range debris constitutes "discarded material" (and thus "solid waste") and agreed with much of EPA's position.⁵⁶ The court embraced EPA's view that while lead shot is technically hazardous, firing ranges are not facilities that manage hazardous wastes subject to EPA promulgated RCRA regulations;⁵⁷ they do not require RCRA permits and cannot be sued by citizens for operating without a permit.

However, the court concluded that shooting ranges do remain within the statutory jurisdiction of RCRA.⁵⁸ Thus, while not subject to a citizen's suit for violating EPA regulations requiring TSD permits, ranges still can be sued by citizens under RCRA's statutory provisions if they pose an imminent and substantial threat to human health or the environment.⁵⁹ EPA's current view, expressed in its Range BMPs, is that the capacity of a range to recover and reclaim spent lead projectiles will determine its exposure to citizens' imminent hazard suits.⁶⁰

C. Superfund Litigation Against Ranges

CERCLA emerged in the wake of the Love Canal disaster and was a testament to the fact that major gaps still existed in the scheme of federal environmental regulations. With the National Environmental Policy Act⁶¹

tungsten and bismuth shot have been approved by USFWS as an alternative to lead shot. The viability of these alternatives for rifles and pistols is an open question. Switching to non-lead projectiles might avoid a RCRA violation but non-lead alternatives discharged into water are still literal violations of the CWA. See *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

53. See 42 U.S.C. § 6972 (2000) (authorizing citizen suits against those whose handling of solid or hazardous waste may present an imminent and substantial endangerment to health or the environment).

54. 989 F.2d 1305, 1309, 1313 (2d Cir. 1993).

55. *Id.* at 1310.

56. *Id.*

57. *Id.* at 1316.

58. *Id.*

59. *Id.* at 1315-16.

60. See EPA, RANGE BMPs, *supra* note 14, at I-7.

61. 42 U.S.C. § 4321 (2000).

(NEPA), Clean Air Act⁶² (CAA), CWA, and RCRA in place, some had argued that the loopholes in the federal scheme of pollution control had been closed. It was not an unfounded boast. All environmental media (air, water, and land) and federal decision making (through NEPA environmental impact statements) were basically covered. But Love Canal revealed a deficiency where a hazardous disposal site was detected and the polluter had disappeared.

CERCLA established a federal fund, the "Superfund," to fill the gap. It also established a separate scheme of liability that made "owners, operators, arrangers and transporters" of hazardous substances essentially jointly and severally liable for the cleanup of facilities where those substances are released. Every presumption works against the responsible parties under CERCLA, so much so that clients or litigants familiar with traditional tort conceptions of liability are stunned to learn how wide CERCLA's net is. Liability without causation⁶³ and joint and several liability⁶⁴ regardless of the level of hazard are, to the uninitiated, among the more surprising aspects of CERCLA. Early on, Judge Wright observed that a defendant who disposed of a penny in a landfill (copper, a common constituent in rifle and pistol bullets, is a CERCLA hazardous substance) was at least jointly and severally liable for the cost of cleaning up the entire mess.⁶⁵

CERCLA's citizens' suit provisions are relatively new, and potentially more narrow in scope than RCRA's or the CWA's provisions. Most of the recorded litigation under CERCLA has depended instead on EPA's decision to order a cleanup by a potentially responsible party or to clean up the release itself and pursue responsible parties for the costs.⁶⁶ Over the last thirty years, defendants have lost a long line of cases challenging EPA's ever expanding conception of responsible parties and ever tighter interpretation of the already limited statutory defenses. In most instances today, liability is clear, and rather than being litigated, is settled through an administrative consent order.

62. *Id.* § 7401.

63. Because of the difficulty of fingerprinting waste to show that a defendant's waste was the precise substance discharged, CERCLA has been interpreted to require only that the defendant sent waste to the site, waste of that type was found at the site, and there has been a discharge of hazardous substances at the site. The government need not show that it was the defendant's particular waste that was discharged. The reasoning is that once a leak has occurred, the mere fact that a defendant's waste is at the site adds to the cleanup problem. *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988).

64. For example, in *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992), defendant argued that its water-based paint waste contained hazardous substances in concentrations less than those in the paper on which the briefs before the Court were printed, less even than in "clean dirt." Yet the court still held against Alcan.

65. *See United States v. Conservation Chem. Co.*, 619 F. Supp 162, 196 (W.D. Mo. 1985). Also surprising is the fact that one may be ordered to conduct a cleanup, face penalties for refusing, and barred from judicial review of the cleanup order until EPA decides to take enforcement action, often well after the questioned cleanup is finished. 42 U.S.C. § 9613 (2000).

66. *See EPA, RANGE BMPS, supra* note 14, at I-12,13.

EPA's Range BMPs give an example of the typical case administered through consent order. The basis for agency action was the determination that lead is a hazardous substance under CERCLA. In *Southern Lakes Trap and Skeet Club Site, Lake Geneva, Wisconsin*, EPA and USFWS required the owners and operators of the range to perform remedial work at the site and pay one million dollars of cleanup costs.⁶⁷ The range closed permanently.

Another example illustrates the possibility of federal power trenching on state interests that is useful for our purposes. In *Walter L. Kamb v. United States Coast Guard*.⁶⁸ Kamb, as property guardian, brought a CERCLA cost recovery action against the California Highway Patrol, the City of Fort Bragg, and Mendocino County to recover the costs of cleaning up lead residue at a property that had been used as a rifle, pistol, and shotgun firing range. The court ruled that defendants were responsible parties but deferred apportionment of liability.⁶⁹ Thus, not only private parties but also state agents and political subdivisions may be deemed directly liable under CERCLA for cleanup costs in amounts that ultimately will prevent all but the most deeply insured from sponsoring, owning, or using firing ranges.

D. EPA Range Policy

EPA's firing range policy is like gun ownership under the SRSA. Firing ranges survive as a political matter, dependent on generous exercise of government discretion. EPA's Range BMPs express only non-binding policy priorities⁷⁰ and certainly have not deterred private party actions resulting in range closures.⁷¹ As discussed above, citizens' actions are an imminent threat to range survival.⁷² Moreover, EPA itself has closed ranges using CERCLA and declared

67. See *id.* at I-11; see also Notice of Lodging of Consent Decree Pursuant to CERCLA and RCRA; Lake Geneva Assocs. et al., 63 Fed. Reg. 55409-02 (Dep't Justice Oct. 15, 1998), Damage Assessment Plan: Southern Lakes Trap and Skeet Club, Lake Geneva, WI, 58 Fed. Reg. 39229-02 (Dep't Interior July 22, 1993).

68. See EPA, RANGE BMPs, *supra* note 14, at I-11; 869 F. Supp. 793 (N.D. Cal. 1994).

69. 869 F. Supp. at 799.

70. See EPA, RANGE BMPs, *supra* note 14, at Notice page.

71. For other examples of RCRA litigation including EPA action, see, e.g., *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998); *Rowlands v. Pointe Mouillee Shooting Club*, 959 F. Supp. 422 (E.D. Mich. 1997), *rev'd*, 182 F.3d 918 (6th Cir. 1999) (unpublished opinion); *In re Training Range and Impact Area, Mass. Military Reservation*, No. RCRA I-2001-0014, 2001 EPA RJO LEXIS 4 (EPA Office of Regional Jud. Officers, April 5, 2001); *In re Lackland Training Annex*, No. RCRA VI-311-H, 1995 EPA ALJ LEXIS 45 (EPA Office of Admin. Law Judges, May 12, 1995). For other CWA litigation, see, e.g., *Puerto Rico v. Rumsfeld*, 180 F. Supp. 2d 145 (D.D.C. 2001); *Stone v. Naperville Park District*, 38 F. Supp. 2d 651 (N.D. Ill. 1999).

72. This is not unusual. Much environmental regulation, regardless of who is in the White House, is prompted by private party law suits. Whether it is enforcement through individual use of citizens' suit provisions or litigation driven rule-making, critics call the progression from EPA missing a statutory deadline, to lawsuits by public interest groups against EPA, to judicial decisions

ranges that shoot over water an endangered species.

We have then one side of a state/federal conflict about the primary places where Americans bear arms. As demonstrated below, the other side of the conflict is basically in place, with troublesome details in the wings.

II. FEDERAL COURTS, STATES' RIGHTS, AND THE SECOND AMENDMENT

Second Amendment scholars call the individual rights view of the Second Amendment the standard model. In the past two decades there has been a great deal of scholarship supporting the standard model, and some notable converts to the view that notwithstanding the subordinate clause ("a well regulated militia, being necessary to the security of a free state"),⁷³ it is just not credible to transform the independent clause ("the right of the people to keep and bear Arms, shall not be infringed")⁷⁴ into a right of the states.⁷⁵ Nonetheless, a consistent line of lower federal court decisions say just that.

These decisions are grounded ostensibly on the 1939 Supreme Court decision in *United States v. Miller*.⁷⁶ The defendant, Jack Miller, was indicted for possession of an unregistered, untaxed, sawed-off shotgun in violation of the 1934 National Firearms Act. The district court dismissed the charge against Miller on the grounds that the pertinent section of the 1934 Act violated the Second Amendment.⁷⁷ By the time the case was argued before the Supreme Court, Jack Miller was missing. The government argued the case unopposed.

Superficially, *Miller* is a paradox. The Court plainly maintains that weapons protected by the Second Amendment must bear some reasonable relationship to

or settlements imposing a duty to act as initially required by statute "regulation by litigation". See, e.g., ROBERT V. PERCIVIL ET AL., *ENVIRONMENTAL REGULATION: LAW SCIENCE AND POLICY* 685 (3d ed. 2000) (describing the litigation and settlement that lead to EPA compliance with congressional instructions to develop health based standards for toxics discharges into surface waters). However the deference mandated by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 856 (1984), on technical matters such as the details of RCRA's regulatory scheme (as opposed to explicit timetables for rulemaking or other express congressional instructions) suggests that EPA's current decision to rely on technology and lead reclamation and recycling to deal with the range discharge problem is probably immune from agency-forcing attack by private plaintiffs. But see Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 374 (1994) (suggesting that reliance on text is supplanting deference).

73. U.S. CONST. amend. II.

74. *Id.*

75. See *supra* note 1. Eugene Volokh explains that prefatory language like the subordinate clause "[a] well regulated militia" was common in the language of state constitutions at the time and was never interpreted as a strict limitation on the independent clause. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

76. 307 U.S. 174 (1939).

77. *Id.* at 177.

the preservation or efficiency of a well regulated militia.⁷⁸ But just as plainly, it embraces the traditional view that the militia is the body of the people bearing their own private arms.⁷⁹ And while the district court decision was reversed, the case also was remanded for determination of the utility of the sawed-off shotgun for militia purposes.⁸⁰

While this has produced a generally credible division of opinion among scholars about the meaning of *Miller*, the lower federal courts through a series of decisions beginning in 1942, have washed this troublesome duality almost completely out of *Miller*. The recent decision in *United States v. Emerson*, ruling that the Second Amendment protects an individual right to arms and giving more analytical attention to the matter than virtually the entire balance of district and circuit court opinions, is a nearly singular exception.⁸¹ Although some members of the Supreme Court have indicated their belief that the Second Amendment protects an individual right,⁸² there is still doubt that the Court will take a Second Amendment case.⁸³ So the states' rights cases stand. The question is what do they stand for.

Since no state assertion of Second Amendment rights has been litigated, the SRSA has been, up to now, a cursory explanation of the right of the people to keep and bear arms that typically precedes a conclusion that the Constitution does not protect private firearms. But this description need not and should not define the doctrine. Our first hope must be that nearly sixty years of federal court decisions developing the SRSA have established something more than a makeweight.

So what to make of the states' rights view? The few scholars who have pursued it seriously speculate without much judicial guidance that it means states retain the right to maintain instruments of war. Don Kates and Glenn Reynolds engage the idea as a thought experiment and advance a number of arguments suggesting the states' rights view cannot be squared with the constitutional text governing the respective roles of the federal and state governments regarding the

78. *Id.* at 178.

79. *Id.* at 179.

80. *Id.* at 183.

81. 270 F.3d 203, 260 (5th Cir. 2001); *see also* *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002).

82. Chief Justice Rehnquist's opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), explains that "the people," as used in the First, Second, Fourth, Ninth and Tenth Amendments, is a "term of art" referring to "a class of persons who are part of a national community." Justice Thomas's concurrence in *Printz v. United States*, 521 U.S. 898, 936-37 (1997), indicates he might see an individual right in the text of the Second Amendment. Justice Scalia seems to find the right of the people to keep and bear arms to mean just that. *See* Antonin Scalia, *Vigilante Justices: The Dying Constitution*, NAT'L REV., Feb. 10, 1997, at 32, 32-33 ("We may like . . . the elimination of the right to bear arms; but let us not pretend that these are not reductions of rights.").

83. *See Silveira*, 312 F.3d at 1075 (noting that the Court has been unwilling to dive into the troubled waters of Second Amendment interpretation).

militia and that it is a dubious idea as a matter of policy.⁸⁴ On the policy front they argue, for example, that the possibility of armed tension between the federal military and a state military body (equipped presumably with modern military armament like artillery and air power) is much more worrisome than anything resulting from the “people” bearing their private firearms.⁸⁵ States’ rights advocates, policy makers and many American citizens on the other hand, seem to find the idea of a state exercise of the right to keep and bear arms much less problematic as a practical matter.

Maybe this view is a function of the marginalization of the states in the last several generations. Certainly it ignores our history of broad state autonomy, our Civil War, and the state/federal showdowns of the civil rights era.⁸⁶ However, with the exception of the *Emerson* decision, scholarly critiques arguing the worrisome policy implications of the SRSA have not shaken the lower federal courts’ commitment to the position.⁸⁷

Several progressively more stringent renditions of the states’ rights view can be extracted from the case law culminating in the recent Ninth Circuit Court of Appeals decision in *Silveira v. Lockyer*.⁸⁸ Each rendition starts nominally with *Miller* and then evolves into something quite different from what the *Miller* opinion actually says.⁸⁹

84. Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States’ Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1739 (1995). See also *infra* notes 141, 144-45, and 155 (showing that the text of the Constitution dealing explicitly with militia rights makes the SRSA superfluous or means the SRSA implicitly repealed Article 1, Section 8).

85. Reynolds & Kates, *supra* note 84, at 1750-52. Today, the individual rights view of the Second Amendment means less that government will be overthrown through force and more that drastic infringements of liberty will have a prohibitively high cost. The furor over Waco and Ruby Ridge show that the capacity of the federal government to successfully use force against American citizens is quite limited. See, e.g., DAVID T. HARDY & REX KIMBALL, THIS IS NOT AN ASSAULT: PENETRATING THE WEB OF OFFICIAL LIES REGARDING THE WACO INCIDENT (2001). However, if citizens do not have guns, the dynamic changes drastically in favor of government, since the threat of force is a more effective tool domestically than the actual use of it. With a disarmed population, the threat is more fearsome and government is more able to achieve its ends through less than lethal violence. The capacity to push the conflict to lethal confrontation (even without the ability to win that confrontation) is the important federal-power-limiting function of the individual right.

86. As for the future, who knows? The platform of the Alaska Independence Party (which has major party status in the state) includes strong support of the right to keep and bear arms and the goal of Alaskan independence. ALASKAN INDEPENDENCE PARTY, PLATFORM, available at <http://www.akip.org/platform.html> (last updated Mar. 29, 2003). See also Jon Dougherty, *Alaskan Party Stumps for Independence*, WORLDNETDAILY.COM (Feb. 25, 2001), available at http://www.worldnetdaily.com/news/article.usp?ARTICLE_ID=21840.

87. For example, *Silveira* acknowledges *Emerson* and the recent scholarship, but still hews the states’ rights view. *Silveira*, 312 F.3d at 1069.

88. *Id.*

89. Brannon Denning maps the pre-*Silveira* evolution from the early to current cases. Brannon P. Denning, *Gun Shy: The Second Amendment as an “Underenforced Constitutional*

Sketching the superficial paradox of *Miller*, I highlighted the Court's conclusions that there was no evidence that the sawed-off shotgun had some reasonable relationship to the militia, and that the militia constitutes all able-bodied male citizens.⁹⁰ If one stops at this point, *Miller* remains a puzzle. But there is clarification in the fact that in remanding the decision, the Court gave fairly explicit instructions regarding the proof that would be necessary to sustain a claim under the Second Amendment. The Court suggested two ways the reasonable relationship to the militia might be but was not established. Defendants might show: 1) that the weapon is part of ordinary military equipment, or 2) that its use could contribute to the common defense.⁹¹ Since defendants won at the district court without presenting such evidence and the Court was not willing to take judicial notice that the shotgun satisfied these criteria, remand was necessary.

Recall now the threshold matter that the Court recognized as undisputed—*viz.*, the membership of defendants in the militia. The Court embraced the traditional definition of the militia, as “comprised of all males physically capable of acting in concert for the common defense . . . expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”⁹²

A straight forward construction of *Miller* suggests, then, two stages of analysis: first, an easy question of whether an individual is a member of the militia (very easy except where the claim is made by a woman, or a very young, very old, or disabled male);⁹³ and, second, whether the possession and use of the weapon has some reasonable relationship to “the preservation or efficiency” of

Norm,” 21 HARV. J.L. & PUB. POL’Y 719 (1998) [hereinafter Denning, *Gun Shy*]; Denning, *Can the Simple Cite Be Trusted?*, *supra* note 8. Denning claims that the dominant judicial view of *Miller* stems from illegitimate and contemptible abuse of judicial power. Denning, *Gun Shy*, *supra*, at 735. His criticism of the process employed in the states’ rights cases is beside the point for the purpose of this Article, but his mapping of the cases provides a more detailed view of the renditions of the states’ rights view than is presented here.

90. See *supra* notes 79-80 and accompanying text.

91. *United States v. Miller*, 307 U.S. 174, 178 (1939) (citing *Aymette v. Tennessee*, 21 Tenn. (2 Hum.) 154, 158 (1840)).

92. *Id.* at 179.

93. Congress has defined the unorganized militia as all able-bodied male citizens at least seventeen years of age and under forty-five years of age and women citizens who are members of the National Guard. 10 U.S.C. § 311 (2000). *Miller* suggests that militia membership was limited by age for males. It seems to exclude females. *Miller*, 307 U.S. at 179. Robert Cottrol and Raymond Diamond illustrate that historically the militia commonly excluded free blacks and slaves. They emphasize, however, that the *people* to whom the right extends (under the individual rights view) are a broader class than the *militia*. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEORGETOWN L.J. 309, 331 (1991); see also David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (1998) (discussion of extensive nineteenth century sources identifying the militia as virtually the entire male population bearing their own private arms) [hereinafter Kopel, *The Second Amendment in the Nineteenth Century*].

the militia.⁹⁴ This second requirement might be satisfied by showing that the weapon is part of the ordinary military equipment of the time, or that it could contribute to the common defense.⁹⁵

After more than sixty years of lower court citations of *Miller* for the proposition that the Second Amendment contains no individual right to arms, the straightforward interpretation of *Miller* is highly contestable. However, the first lower court decision in which *Miller* was interpreted, *Cases v. United States*,⁹⁶ shows that the "straightforward" two phase interpretation is entirely sound. We also learn that the *Cases* court deemed this straightforward interpretation bad social policy, rejected it as affording too much protection to a wide range weapons, and affirmed the conviction of the defendant by grafting onto the Second Amendment, a previously unknown state of mind requirement.

In *Cases*, the court wrestles with the two-phase *Miller* analysis and concludes that as a rule of general application it unwisely protects an extremely wide range of firearms possession.

At any rate the rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well known fact that in the so called "Commando Units" some sort of military use seems to have been found for almost any modern lethal weapon. In view of this, if the rule of the *Miller* case is general and complete, the result would follow that, under present day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus.⁹⁷

Concluding that *Miller* does not offer a general and complete rule for interpreting the Second Amendment, the court ruled that *Cases* possessed the gun "simply on a frolic of his own and without any thought or intention of contributing to the efficiency of [a] well regulated militia."⁹⁸ Having failed this intent requirement, *Cases* failed to raise a legitimate Second Amendment claim. While the *Cases* standard cannot be found in *Miller*, it has generated its own following⁹⁹ and thus constitutes one established rendition of the SRSA.

Eight years after *Miller*, the Third Circuit rendered an important Second Amendment decision in *United States v. Tot*.¹⁰⁰ *Tot* was convicted of violating

94. *Miller*, 307 U.S. at 178.

95. *Id.*

96. 131 F.2d 916 (1st Cir. 1942).

97. *Id.* at 922.

98. *Id.* at 923.

99. See, e.g., *United States v. Warin*, 530 F.2d 103 (6th Cir.), cert. denied, 426 U.S. 948 (1976).

100. 131 F.2d. 261 (3d Cir. 1942), rev'd, 319 U.S. 463 (1943) (reversed on grounds that the presumption in the Federal Firearms Act that the gun was received by defendant in interstate commerce after the effective date of the act violated due process). Though *Tot* was reversed on other grounds, it continues to be cited for its Second Amendment analysis. See *Engblom v. Carey*

a federal law that prohibited the possession of a gun that could accommodate a silencer. He raised the Second Amendment as a defense, claiming he was experimenting with modifications to the gun with the aim of offering the improved weapon as a prototype for consideration by the government for military use. *Tot*'s claim might have satisfied the state of mind requirement of *Cases*, but the court imposed a more rigorous test. With citations to dubious sources,¹⁰¹ the court concluded:

It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment . . . was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.¹⁰²

On this view of the Second Amendment, something more than the showing *Tot* was prepared to make is required to sustain a claim. What precisely this showing might be, we are left to wrestle with. For now it is sufficient to acknowledge *Tot* and its progeny¹⁰³ as providing a more burdensome rendition of the Second Amendment than either *Cases* or *Miller*.

The fullest and most recent exposition of the SRSA appears in *Silveira v. Lockyer*.¹⁰⁴ *Silveira* is notable for two things (weaknesses,¹⁰⁵ perhaps, but still pillars of this most stringent rendition of the SRSA) that add some texture to the position taken in *Tot*. First, the court simply ignores the declaration in *Miller* that the militia is the body of the people bearing their own private arms, and concludes that nominal membership in the militia (like that enjoyed by millions of Americans under 10 U.S.C. § 311) confers nothing particular in the way of

522 F. Supp. 57, 71 (S.D.N.Y. 1981).

101. Steve Halbrook shows that "not a single original source quoted in *Tot* substantiates its assertion that the Second Amendment 'was not adopted with individual rights in mind'" and "at least two of the [sources] directly contradict the *Tot* thesis." STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 190-91 (1984).

102. *Tot*, 131 F.2d at 266.

103. See, e.g., *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996).

104. The decision acknowledges that most of the previous SRSA cases rest on very thin analysis. *Silveira v. Lockyer*, 312 F.3d 1052, 1063-64 (9th Cir. 2002) ("Like other courts, we reached our [earlier] conclusion regarding the Second Amendment's scope largely on the basis of the rather cursory discussion in *Miller*, and touched only briefly on the merits of the debate . . . *Miller*, like most other cases that address the Second Amendment, fails to provide much reasoning in support of its conclusion."). See also Denning, *Can the Simple Cite Be Trusted?*, *supra* note 8 at 989 (criticizing district court cases that give a simple citation to *Miller* but apply the rulings of *Cases* or *Tot*).

105. Some of the analytical weaknesses of *Silveira* are laid out in both the majority and concurring opinions of the recent Ninth Circuit opinion in *Nordyke v. King*, 319 F.3d 1185 (9th Cir.), *reh'g denied*, 364 F.3d 1025 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 60 (2004).

individual rights.¹⁰⁶ Second, the court discerns from the words “bear arms” that the verbs in the Second Amendment have a peculiarly military cast that only the state can satisfy.¹⁰⁷ Because “bear” connotes military function and appears with “keep” (although second in order), the court concludes that the meaning of “keep” is a mystery that, in any case, must be construed consistent with the state grounded military connotation of “bear.”¹⁰⁸ The Second Amendment, therefore, does not protect any private “keeping” of arms.

Thus, in the view of the Ninth Circuit, a successful assertion of the Second Amendment requires the direct imprimatur of the state; any bearing of arms must be explicitly authorized by the state for purposes of pursuing the state’s interest in militia preparedness. Any keeping of arms by private parties on the model of the traditional militia of the whole described in *Miller*, would again require some sort of explicit state authorization related to the militia (something more than a general acknowledgment that a citizen is a member, technically, of the militia).

I will suggest below why if it is to mean anything at all, the SRSA of *Silveira* must at least privilege particular types of state legislation protecting shooting ranges from federal environmental closure; how if it protects this, it is difficult to avoid protecting a broader range of related arms bearing; and how existing federal gun control legislation is more at risk from state assertions of rights under the SRSA than from an individual right subject to reasonable regulation.

III. STATE ENVIRONMENTAL IMMUNITY LEGISLATION AND CIVILIAN MARKSMANSHIP PROGRAMS TRACKING THE FEDERAL CMP

It is now a common observation that the gun debate reflects a broader cultural divide.¹⁰⁹ In some places the idea of America as a “Nation of Riflemen” resonates deeply.¹¹⁰ In others, this will be a phrase heard for the first time and its meaning will be difficult to stomach.

This cultural divide leads to surprises—notably for our purposes, surprises for those outside the gun culture. Many people who believe they do not know anyone who owns a gun are flabbergasted to learn that on average, there is a gun

106. *Silveira*, 312 F.3d at 1063 n.11 (citing *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977)). The Tenth Circuit rejected defendant’s claim that because the Kansas Constitution defined him as a member of the Kansas Militia, he had a right to own an unregistered machine gun. *Oakes*, 564 F.2d at 387 (citing KANSAS CONST. art. VIII, § 1 (militia as able bodied males between eighteen and forty-five)). Citing *Miller*, the court concluded, “[t]o apply the amendment so as to guarantee appellant’s right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy.” *Id.*

107. *Silveira*, 312 F.3d at 1073-74 nn.28-31.

108. *Id.* at 1075.

109. See Johnson, *supra* note 1; Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53 (2002).

110. See, e.g., JAMES B. WHISKER, *THE CITIZEN SOLDIER AND UNITED STATES MILITARY POLICY* 2 (1979).

in nearly every other American household.¹¹¹ They are equally astounded to learn the range of measures state legislatures have taken to support and protect the gun culture. Thirty-eight states have legislation liberally granting citizens the right to carry concealed firearms. Eight more states have restrictive concealed carry schemes.¹¹² More than forty states have preempted municipalities from

111. See GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 51-52 (1991) (listing surveys from the 1980s and 1990s which estimated the number of households owning any type of gun to be 40-52%); Don B. Kates & Henry E. Schaffer et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 572 (1995) (noting a 110% "increase in handgun ownership in the 20 year period 1973-1992"). I have been writing about gun rights long enough now that it is not unusual for men in these circles (so far it always has been men) to approach me and say they are closeted gun rights supporters. Several have, in strictest confidence, even disclosed the dirty secret that they actually own a gun.

112. See generally Clayton E. Cramer & David B. Kopel, "*Shall Issue*": *The New Wave of Concealed Handgun Permit Laws*, 62 TENN L. REV. 679 (1995).

Because we are generalizing about state laws that are not uniform, there is disagreement at the margins about precisely how to characterize every state. Ian Ayres and John J. Donohue, III criticize that John Lott has classified Alabama and Connecticut as "shall issue" states while Handgun Control, Inc. calls them "may issue" states. See Ian Ayres & John J. Donohue III, *Nondiscretionary Concealed Weapons Laws: A Case Study of Statistics, Standards of Proof, and Public Policy* (n.d.) (reviewing JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* 1 n.2 (1998)), available at <http://islandia.law.yale.edu/ayers/pdf/lottreview.pdf#search='ian%20ayres%20nondiscretionary%20concealed%20weapons%20laws'>.

The basic distinction for our purposes is states where an ordinary citizen can obtain a license to carry without any special showing other than a general interest in self-defense. Thirty-five state laws are explicitly non-discretionary ("shall issue"). Alabama is technically discretionary, but it is essentially shall issue in practice. Applicants denied a permit in Alabama would likely be denied one in a shall issue state for the same reason. The NRA has called this "reasonable may issue." See NRA, *GUIDE TO RIGHT-TO-CARRY RECIPROCITY AND RECOGNITION* 2 (Jan. 2005), available at <http://www.nraila.org/recmap/recguide.pdf>. Connecticut and Iowa operate a similar liberal discretionary or "reasonable may issue" schemes. *Id.* at 4, 6.

The NRA generally excludes states like New Jersey from the list of right to carry states, even though New Jersey for example grants a limited number (about 1,000 in 1995 mainly to security guards) of permits. See Abby Goodnough, *Concealed Weapons: A Senator Says Their Time Has Come*, N.Y. TIMES, May 19, 1996, at 13NJ8. The full list of states with restrictive permitting systems are California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island.

The four absolute non issue states technically are Nebraska, Kansas, Illinois, and Wisconsin. However, Wisconsin's inclusion on this list is now controversial since the Wisconsin Supreme Court has ruled that in some circumstances, the statute barring concealed carry must yield to "reasonable exercise of the [vintage 1998] constitutional right to keep and bear arms for security." See *State v. Hamdan*, 665 N.W.2d 785, 790 (Wis. 2003). In 2004, the Wisconsin legislature came within one vote of overriding the governor's veto of a shall issue concealed carry bill.

For purpose of our count, I will start with the classification used by the gun control group Join Together Online.

passing firearms regulations that are more stringent than state law.¹¹³ Although these state preemption statutes arguably already prevent covered municipalities from suing gun manufacturers,¹¹⁴ nineteen states have passed legislation specifically blocking municipalities from suing gun manufacturers for the criminal misuse of their products.¹¹⁵ Forty-four states have constitutional provisions that protect an individual right to arms in language that generally brooks no argument about it being some collective right that does not apply to individual citizens.¹¹⁶ These state constitutional guarantees are not moribund

With the recent passage of a shall issue handgun law in Ohio, the number of states that have eased restrictions on concealed gun carrying has risen to 35 [shall issue states]. But in the face of this onslaught, four heartland states are holding fast to their long-time laws that prohibit the carrying of concealed guns by people other than police officers. [These four], Illinois, Kansas, Nebraska, and Wisconsin . . . stand apart not only from the shall issue states but from the 11 "may issue" states . . .

Dick Dahl, *Four States Holding to "No Issue" Handgun Laws*, JOIN TOGETHER ONLINE, June 28, 2004, at <http://www.jointogether.org/gv/news/features/reader/0%2C2061%2C572284%2C00.html>.

Adding the liberal, reasonable may issue/effectively shall issue states Alabama, Iowa, and Connecticut yields the NRA's 38 right to carry states and the claim that "[s]ixty-four percent of Americans live in RTC states." See NRA, FACT SHEET, RIGHT TO CARRY 2005 (Mar. 17, 2005), available at <http://www.nraila.org/issues/FactSheets/Read.aspx?ID=18>.

113. James H. Warner, *Municipal Anti-gun Lawsuits: How Questionable Litigation Substitutes for Legislation*, 10 SETON HALL CONST. L.J. 775, 776 (2000). Because state laws are not uniform there is disagreement about their impact. Americans for Gun Safety puts the number of preemption statutes at forty. Americans for Gun Safety Foundation, *Gun Glossary*, at <http://www.campaignadvantage.com/services/websites/archive/agsfoundation/glossary.html#preemption> (last visited Apr. 22, 2005). David Kopel explains some of the disagreement and lists the preemption number at forty-four states. See David B. Kopel, *Limited Preemption of Firearms Laws: A Good Step for Civil Rights*, Second Amendment Project (Mar. 11, 2003), at <http://www.davekopel.com/2A/IB/limited-preemption.htm>.

114. See *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 889 (E.D. Pa. 2000) (interpreting 18 PA. CONS. STAT. ANN. § 6120).

115. Jon S. Vernick & Julie Samia Mair, *State Laws Forbidding Municipalities from Suing the Firearm Industry: Will Firearm Immunity Laws Close the Courthouse Door?*, 4 J. HEALTH CARE L. & POL'Y 126, 134-35 (2000); see also Annie Tai Kao, Note, *A More Powerful Plaintiff: State Public Nuisance Lawsuits Against the Gun Industry*, 70 GEO. WASH. L. REV. 212, 223 (2002).

116. See generally David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 823, 823 (2002) [hereinafter Kopel, *State Constitutions*]. See also David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 512-14 n.390 (1997). The latest provision, Wisconsin's 1998 constitutional amendment, is discussed in Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 WIS. L. REV. 249. Two of these state guarantees (Kansas and Massachusetts) have been interpreted as collective rights. See *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976), *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905).

artifacts. Twenty of them were adopted or strengthened in the last forty years, most recently in 1998.¹¹⁷ Forty state legislatures have passed laws protecting shooting ranges from noise nuisance lawsuits and other claims.¹¹⁸

117. See, e.g., NEB. CONST. art. I, § 1 (affirming the right to bear arms for defense of self and family, for the common defense, and for hunting and recreation); NEV. CONST. art. 1, § 11 (affirming "the right to keep and bear arms" for security, defense, lawful hunting, and recreation); N.H. CONST. pt. 1, art. 2-a ("All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state."); W. VA. CONST. art. III, § 22 (affirming the right of citizens to bear arms for defense of family, self, and state, and for recreation and hunting). See Kopel, *State Constitutions*, *supra* note 116, at 824 for a description of the twenty most recent amendments and reaffirmations.

118. The following are statutes that protect shooting ranges from such claims. ALA. CODE § 6-5-341 (2002); ALASKA STAT. § 16.55.020 (Michie 2001) (broad affirmative support for ranges and shooting); ARIZ. REV. STAT. § 17-273 (2001) (broad affirmative support for ranges); CAL CIV. CODE § 3482.1 (West 2003) (noise nuisance exemption); COLO. REV. STAT. § 13-21-111.8 (2001) (immunity against claims by range users who assume risk of injury); CONN. GEN. STAT. § 22a-74a (2001) (noise nuisance immunity); FLA. STAT. ch. 823.16 (2001) (exemption from specified rules and nuisance actions); GA. CODE ANN. § 41-1-9 (1996) (noise nuisance exemption); IDAHO CODE § 55-2601 (Michie 2004) (noise nuisance immunity); IDAHO CODE § 36-412A (Michie 2002) (education programs); IND. CODE ANN. § 14-22-31.5-6 (West 2002) (limiting liability for noise pollution); IOWA CODE § 657.9 (2002) (immunity where plaintiff comes to the nuisance); KAN. STAT ANN. § 58-3222 (Supp. 2003) (noise nuisance immunity); KY. REV. STAT. ANN. § 237.210 (Banks-Baldwin 2002) (general and noise nuisance immunity); LA. REV. STAT. ANN. § 30:2055.1 (West 2003) (noise nuisance immunity); ME. REV. STAT. ANN. tit. 17, § 2806 (West 2002) (limiting claims where plaintiff comes to the nuisance); MD. CODE ANN., CTS. & JUD. PROC. § 5-403.1 (2002) (limiting claims where plaintiff comes to the nuisance); MASS. GEN. LAWS ch. 214, § 7B (2002) (limiting liability for noise nuisance); MICH. COMP. LAWS § 691.1542 (2002) (limiting applicability of noise regulations); MISS. CODE ANN. § 95-13-1 (2002) (immunity from noise regulations); MONT. CODE ANN. § 76-9-101 (2002) (general protection and endorsement of ranges: "[i]t is the policy of the state of Montana to provide for the health, safety, and welfare of the citizens of the state by promoting the safety and enjoyment of the shooting sports among the citizens of the state and by protecting the locations of and investment in shooting ranges for shotgun, archery, rifle, and pistol shooting"); MONT. CODE ANN. § 45-8-111(5) (2002) (immunity from noise nuisance); NEV. REV. STAT. § 40.140 (2002) (noise nuisance immunity); N.H. REV. STAT. ANN. § 159-B:1 (2002) (noise nuisance immunity); N.M. STAT. ANN. § 17-8-2 (Michie 2002) (noise nuisance immunity); N.Y. GEN. BUS. LAW § 150 (McKinney 2002) (establishing affirmative defenses against noise nuisance liability); N.C. GEN. STAT. § 14-409.46 (2002) (noise nuisance immunity); N.D. CENT. CODE § 42-01-01.1 (2002) (noise nuisance immunity); OHIO REV. CODE ANN. § 1533.85 (Anderson 2002) (noise nuisance immunity); OKLA. STAT. tit. 63, § 709.2 (2003) (noise nuisance immunity); OR. REV. STAT. § 467.131 (2001) (noise nuisance immunity); 35 PA. CONS. STAT. § 4501 (Michie 2002) (noise nuisance immunity); S.C. CODE ANN. § 31-18-40 (Law. Co-op 2002) (providing for immunity from noise control regulations); S.D. CODIFIED LAWS § 21-10-28 (Michie 2002) (declaring that a shooting range is not a nuisance); TENN. CODE ANN. § 39-17-316 (2002) (noise nuisance immunity); TEX. LOC. GOV'T CODE ANN. § 250.001 (Vernon 2002) (noise nuisance immunity); UTAH CODE ANN. § 47-3-3 (2003) (noise nuisance immunity); VT. STAT. ANN. tit. 10,

At least one state has protected shooting ranges from, *inter alia*, environmental liability for lead discharges. Alabama Code section 6-5-341 ("Alabama 341") immunizes shooting ranges from lead pollution liability (as well as noise pollution liability and claims based on attractive nuisance).¹¹⁹ Alabama 341 does not expressly invoke the Second Amendment. It is not even clear that it articulates an intention to immunize firing ranges from federal environmental legislation. Alabama 341 immunizes ranges from rules and regulations of "any governmental body limiting levels of lead occurring in the

§ 5227 (2003) (noise nuisance immunity); VA. CODE ANN. § 15.2-917 (Michie 2002) (immunity from local noise ordinances); W. VA. CODE § 61-6-23 (2003) (noise nuisance immunity); WIS. STAT. § 895.527 (2002) (noise nuisance or regulation immunity); WYO. STAT. ANN. § 16-11-102 (Michie 2002) (noise nuisance immunity).

119. ALA. CODE § 6-5-341 (2002).

...

(2) Notwithstanding any other provision of law, any person, firm, or entity who operates or uses a sport shooting range in this state shall not be subject to civil liability or criminal prosecution in any matter relating to noise or noise pollution or lead or lead pollution resulting from the operation or use of the range if the range is being operated between the hours of 9:00 a.m. and 9:00 p.m. and if the range has been in existence prior to 1990 or is in compliance with any noise or lead control laws or ordinances that applied to the sport shooting range and its operation on August 1, 2001, or at the time the sport shooting range came into existence, whichever event occurs first.

(3) Any person, firm, or entity who operates or uses a sport shooting range is not subject to an action for nuisance and is not subject to injunction to stop the use or operation of the shooting range on the basis of noise or noise pollution or lead or lead pollution if the range is being operated between the hours of 9:00 a.m. and 9:00 p.m. and if the range has been in existence prior to 1990 or is in compliance with any noise control or lead control laws or ordinances applying to the sport shooting range and its operation on August 1, 2001, or at the time the sport shooting range came into existence, whichever event occurs first.

(4) Except as expressly provided herein, nothing in this section nor the common law doctrine of attractive nuisance shall create any duty of care or grounds for liability toward any person using the property of another for a sport shooting range.

(c) No public street or alley shall be opened through a tract of property used or occupied as a sport shooting range, unless the necessity of the street or alley is first established by verdict of a jury upon a showing of extreme need and impossibility of redirecting or rerouting the street or alley to accommodate the sport shooting range.

(d) Rules or regulations adopted by any governmental body limiting levels of noise in terms of decibel level which may occur in the atmosphere shall not apply to a sport shooting range exempted from liability under this section.

(e) Rules or regulations adopted by any governmental body limiting levels of lead occurring in the atmosphere shall not apply to a sport shooting range exempted from liability under this section.

Id. § 6-5-341(b)(2)-(4)(e).

atmosphere.”¹²⁰ It defines “governmental body” seemingly by reference to state entities only.¹²¹ Moreover, because Alabama 341 only provides immunity from laws or regulations governing atmospheric lead, the federal statutes already discussed arguably do not conflict with it.

These problems aside, it is doubtful that a “states’ rights” federal court would consider the very general language in Alabama 341 as an invocation of the SRSA. Given the hostility of federal courts toward the Second Amendment, it is easy to imagine a court dismissing claims that Alabama 341 trumps RCRA on Second Amendment grounds with a *Cases*-style argument that no intention toward militia purposes was expressed by the legislature.¹²² Similarly, a court

120. *Id.* § 6-5-341(e).

121. *Id.* § 6-5-341(a)(1) & (e). This still raises the potential for conflict with state agencies exercising delegated federal authority to enforce the CWA or RCRA. It is common for federal environmental law to be enforced this way. *See generally* Nicholas J. Johnson, *EPCRA’s Collision with Federalism*, 27 IND. L. REV. 549 (1994) (discussing the boundaries of cooperative federalism under which states enforce federal law).

122. *See Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (imposing an intent requirement on an individual litigant); *supra* notes 97-100 and accompanying text (discussing *Cases*). If the lower federal courts had not been so hostile to a substantive Second Amendment, it would be tempting to advance the argument that the Second Amendment (even the states’ rights version) is self-implementing, i.e., that it needs no explicit legislative invocation. Consequently, the argument would continue, existing state laws that have the effect of protecting militia activity by preserving ranges (even if constitutional protection is not explicitly claimed in the statutory text) should be protected under the SRSA. Why should we care that the legislature explicitly invoked the Second Amendment? Do we impose a threshold procedural requirement that the legislature invoke the Tenth Amendment, or that individuals invoke the First Amendment in order to enjoy constitutional protection? Infringement is infringement, regardless of whether there is an explicit legislative assertion of the SRSA.

One can imagine this argument fatally encumbered by many other questions, particularly in circuits like the Ninth Circuit that already have shown a willingness to ignore inconvenient aspects of the meager guidance the Supreme Court has given on this matter. *See supra* notes 105-08 and accompanying text (criticizing *Silveira* for ignoring Miller’s definition of the militia). Can the question ever arise without state sponsorship? What type of state sponsorship is necessary? Must the conflicting federal statute trench on state property, or is it enough that the federal statute impairs shooting activity that the state has decided to protect? How much difference does the asserted reason for enactment of the state legislation make?

In a neutral tribunal, one might attempt with some optimism the claim that basic range protection measures like Alabama 341 should be protected under the SRSA. Indeed, if courts treated the Second Amendment the way they treat the First, one might *confidently* assert that Alabama 341 and the like were constitutionally privileged against federal impairment. However as Professor Powe illustrates, there is a vast difference in the way courts have treated the First and Second amendments. *See* L. A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997) (comparing the First and Second Amendments, using standard interpretive tools to suggest how constitutional interpretation is affected by judges’ preferences for certain rights). I concede that perhaps no one can be neutral on the question of how to secure basic

might easily conclude as in *Tot*,¹²³ that the militia connection is too remote and cannot be presumed. Or, drawing on *Silveira*,¹²⁴ or the “intermediate” Tenth Circuit standard of *United States v. Oakes*,¹²⁵ a court might conclude that something less perfunctory, more organized, and more clearly related to the goals of an organized, regulated state military force is required to trigger the SRSA.¹²⁶

Alabama will have to do more if its lead immunity legislation is to trump federal environmental law on Second Amendment grounds. *Silveira*, *Oakes*, *Cases*, *Tot*, and a firm line of district court “dittos” demand it. And this might be the end of the story.

The common intuition is probably that legislation sufficient to satisfy the demands of *Silveira* and similar cases is, as a practical matter, highly unlikely - its probability of occurrence roughly equivalent to the danger of the earlier mentioned Arkansas Air Force. At least this is the bet that gun control advocates, who advance the SRSA, seem to have made.¹²⁷ But, the common intuition changes when we consider that existing and long standing federal legislation provides a model that, when grafted onto Alabama 341, squarely meets the demands of *Silveira*. It also injects a number of other factors into the dynamic that makes gun prohibitionists’ wager on the SRSA a sucker’s bet.

safety from violent attacks.

123. *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev’d*, 319 U.S. 463 (1943).

124. *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002).

125. 564 F.2d 384, 387 (10th Cir. 1977) (imposing an intermediate standard).

126. Alaska and Montana go the farthest in general support of bearing arms but without an explicit assertion of the Second Amendment and without obvious reference to protecting state arms-bearing from federal impairment. Section 16.55.020 of the Alaska statutes provides:

Powers of department. In the discharge of its duties under AS 16.55.010, the Department of Fish and Game may

(1) provide, through a departmental coordinator, technical assistance to municipalities, communities, and organizations;

(2) make grants to municipalities and organizations as provided in AS 16.55.030

(A) to develop and operate public shooting ranges and facilities; and

(B) to operate programs involving education and training in the safe use of firearms.

ALASKA STAT. § 16.55.020 (Michie 2002). Montana makes a similar statement of policy, but again without specific articulation of intent to resist federal impairment of its policy goals on Second Amendment grounds. MONT. CODE ANN. § 76-9-101 (2002).

It is the policy of the state of Montana to provide for the health, safety, and welfare of the citizens of the state by promoting the safety and enjoyment of the shooting sports among the citizens of the state and by protecting the locations of and investment in shooting ranges for shotgun, archery, rifle, and pistol shooting.

127. It is very difficult to find a record of government officials, anyone from the gun control lobby, or anyone at all arguing why we should prefer the substantive policy implications of the SRSA. “States’ rights” usually just appears as an answer to why the “right of the people to keep and bear arms” does not mean individual people have a right to arms. The expectation seems to be that the SRSA will have no residual substantive impact.

For over 100 years, the Federal Civilian Marksmanship Program (CMP)¹²⁸ has pursued the distant ideal of America as a nation of riflemen.¹²⁹ Established in 1903 at the prompting of Secretary of War Elihu Root, the program authorized and funded shooting clubs, national shooting competitions, a program for selling surplus U.S. military arms and ammunition to civilians, and encouraging civilian training and practice with military arms at affiliated gun clubs and U.S. government owned ranges.¹³⁰ Until 1996, the program was funded out of the Pentagon budget and operated under the authority of the Department of the Army.¹³¹ Today, the functions of the CMP remain the same, but the Office of the Director of Civilian Marksmanship (DCM) is now a federal corporation.¹³²

In recent decades, the primary rifle sold to civilians through the CMP program has been the .30 caliber, semiautomatic, M-1 Garand, the rifle George Patton called the finest battle implement ever devised.¹³³ Citizens who wish to purchase a Garand through the DCM must comply with a variety of requirements including completing the course of fire in officially sanctioned hi-power rifle matches run by qualifying gun clubs following federal military firing discipline.¹³⁴ Participants at these matches may use rifles and ammunition supplied to the club through the DCM. After qualifying and undergoing a background check, individuals may purchase a surplus Garand and surplus .30 caliber ammunition, with the goal that they will continue to practice and compete.¹³⁵ The Director of Civil Marksmanship estimates that CMP programs

128. 36 U.S.C. § 40721 (2000).

129. See WHISKER, *supra* note 110 at 2.

130. CIVILIAN MARKSMANSHIP PROGRAM, 2003 ANNUAL REPORT (Nov. 15, 2005) (information from inside back cover) [hereinafter 2003 CMP ANNUAL REPORT], available at http://www.odcmp.com/Annual_report.htm.

131. *Id.* at 6.

132. *Id.* A detailed description of the current program is available in the 2003 CMP Annual Report.

133. *Id.* at 8, 10. The Garand was the standard U.S. battle rifle in World War II. It fires a .30 caliber bullet, essentially the 30.06 hunting round. Ballistically, Garand ammunition is superior to the .223 caliber round fired through the M-16 issued to modern troops. Its velocity is lower than that of the .223, but its energy, due to the heavier projectile, is greater. Master gunner Jeff Cooper states, "The classic 30.06 of the United States will do anything that a rifle may be called upon to do, which includes the taking of all forms of live targets, from prairie dogs to Alaskan moose." COOPER, *supra* note 16 at 12. In contrast, many states prohibit use of the .223, for deer hunting because it is unlikely to produce a clean kill and more likely to produce a lightly wounded, long suffering animal who will not be recovered by the hunter. Cooper commonly dismisses the .223 as a "poodle shooter" (referring to the popularity of the round among ranchers for shootings "varmits" like prairie dogs). A semiautomatic version of the army M-16 is available to citizens through the DCM on a more limited basis. See 36 U.S.C. § 40729(a)(3) (2000); see also Civilian Marksmanship Program, *Frequently Asked Questions*, at <http://www.odcmp.com/faqs.htm> (last visited Feb. 26, 2005).

134. 2003 CMP ANNUAL REPORT, *supra* note 130, at 10.

135. See 36 U.S.C. §§ 40721-733 (2000).

reach two million people annually.¹³⁶

Given the longevity of the federal CMP, it is somewhat surprising that no direct state counterparts exist. Perhaps, this is because the federal program has, up to now, served federal, state, and individual goals adequately. Perhaps it is because, until relatively recently, the individual right to arms was relatively unthreatened as a practical, if not a strictly legal matter. Some may find it remarkable that the federal CMP can exist without there having been a concerted campaign from somewhere in “blue America,” mobilizing opposition to the government sale of “assault rifles” and attempting to scrap the CMP.¹³⁷

One can just as easily imagine their counterparts in “red America” either preemptively supplementing their laws with state CMPs or replacing a dismantled federal program with one administered by the state—something the SRSA seems to encourage. For states like Alabama, that already have expressed the aim to protect ranges from lead pollution closure, all that is left to do is follow the instructions laid down by *Silveira*. It is simply a matter of grafting onto Alabama 341 an essential duplicate of provisions governing the federal CMP. The legislation might look something like this:¹³⁸

*The Alabama Range Protection, Militia Discipline and
Civilian Marksmanship Program.*
Alabama Code 223

In pursuit of a well regulated militia and intending to exercise its rights granted under the Second Amendment of the United States Constitution to the fullest extent, the legislature of Alabama does hereby establish the Alabama Civilian Marksmanship Program (“Alabama CMP”), pursuant to which:

(A) Alabama CMP participants shall have all rights and privileges that are and have been enjoyed by members of Federal CMP programs established pursuant to 36 U.S.C. § 40722 and its predecessor sections (“Federal CMP”),¹³⁹ and shall pursue the firing discipline and competition protocol of the

136. CIVILIAN MARKSMANSHIP PROGRAM, CMP CATALOG 2 (Summer 2005), available at <http://www.odcmp.com/Forms/catalog.pdf>.

137. Efforts in this direction have not been concerted. See John Mintz, *M-1 Rifle Giveaway Riles Gun Control Proponents*, PLAIN DEALER (Cleveland) May 9, 1996, at 14A, available at 1996 WL 3550238.

138. I propose here a skeleton of legislation that would satisfy even the Ninth Circuit’s articulated criteria. It is interesting to consider how claims based on Alabama 223 would be treated in the Fifth Circuit, which has said that the Second Amendment establishes not only militia rights but also an intertwined individual right to self-defense. See *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). For one thing, the Fifth Circuit would be more likely than the Ninth to grant individuals standing to raise claims under 223 style legislation.

139. Cf. 36 U.S.C. § 40722 (2000).

Federal CMP to the extent adopted in regulations established by the Governor.

(B) Eligible participants shall include members of the militia as defined by federal law in 10 U.S.C. § 311, and any other citizen of the state, not otherwise disqualified, who assents to militia membership and discipline by complying with Alabama CMP regulations established by the Governor.¹⁴⁰

(C) The Alabama CMP shall coexist with and be independent of the Federal CMP.

(D) The Alabama CMP shall establish and recognize rifle clubs at any shooting ranges that operate consistent with regulations established by the Governor or any club already qualified under the Federal CMP.¹⁴¹

(E) Shooting ranges already protected pursuant to Alabama Code § 6-5-341 or by regulations established by the Governor under this section, shall, pursuant to the Second Amendment of the United States be immune from impairment of operation or closure under any federal, state, or local environmental protection legislation or regulations or any common law tort action.

(F) State funding shall be provided for purchase of targets and ammunition to be distributed without charge or sold at cost to clubs or individuals qualifying under regulations established by the Governor.¹⁴²

(G) The Governor shall establish regulations providing for sale of semiautomatic center-fire rifles by the State of Alabama to citizens of the State who qualify under either the Federal CMP program or the State CMP.¹⁴³

(H) Rifles available for sale under section (G) shall include the M-1 Garand as currently equipped under the Federal CMP, the semiautomatic AR-15, the Springfield M1A or other semiautomatic versions of the Federal Department of Army model M-14, and any other .30 or .22 caliber center-fire semiautomatic rifle similar to one currently or previously adopted as an infantry

140. *Cf. id.* § 40723.

141. *Cf. id.*

142. *Cf. id.* §§ 40728-730.

143. *Cf. id.* § 40731.

rifle by a NATO country or that is deemed by the Governor to be suitable for rifle practice, competition, or militia activity.¹⁴⁴

(I) Citizens who wish to participate in the Alabama CMP shall not be required to purchase rifles or ammunition from the State, and are authorized to use qualifying rifles and ammunition already in their possession, or rifles and ammunition that they purchase from sources other than the State of Alabama.

IV. STATE CMPs AND THE STATES' RIGHTS SECOND AMENDMENT

So, is Alabama 223 enough to force SRSA courts to infuse their creation¹⁴⁵ with positive content? There are some superficial objections that would suggest even here, that SRSA extends no actual rights. But at bottom, legislation like Alabama 223, produces the conclusion that finally we have something the SRSA must protect. Indeed, it turns out that the range of things on this list of protected States' rights are, as a policy matter, equally or more troubling than anything threatened by the individual rights view.

A. *The Basic Content of the Modern Militia Right*

Alabama 223 is exactly the type of legislation the state centric Second Amendment must privilege against conflicting federal law. It represents the basic minimum necessary to trigger the SRSA - military enough to satisfy *Silveira*, but practically one of the most innocuous exercises of the SRSA possible. The point is underscored by comparison to a very early adjudication of a state's militia prerogatives (one that interestingly makes no mention of the Second Amendment).¹⁴⁶

In 1838, the Supreme Judicial Court of Massachusetts was asked by the Governor to advise on whether the state might create exemptions from militia service mandated by federal laws (Militia Acts of 1792 and 1803) established under Article I, Section 8 of the Federal Constitution.¹⁴⁷ The 1838 federal militia obligation puts Alabama 223 in perspective:

[The federal law provides] that each and every free, white, able-bodied, male citizen of the respective States, resident therein, who shall be of the

144. Cf. *id.* §§ 40731-732.

145. David Kopel claims that the SRSA "made its first appearance in a concurring opinion in an 1842 Arkansas decision upholding a law against carrying concealed weapons against a challenge under the Arkansas Constitution and the Second Amendment." Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 93, at 1422.

146. There is a rich discussion about the respective rights and powers of states and the federal government to arm, organize and control the militia. The discussion is grounded exclusively in the text of the original constitution. It does not once mention the Second Amendment. *In re* Opinion of the Justices, 39 Mass. 571, 572 (1838).

147. *Id.*

age of eighteen years and under the age of forty-five years, (except as is hereinafter excepted,) shall severally and respectively be enrolled in the militia by the captain, &c. It is then made the duty of every captain to enrol[l] every such citizen who shall arrive at the age of eighteen years, or shall come to reside within his bounds, (except as before excepted,) and he shall, without delay, notify such citizen of the said enrol[l]ment.

It is further provided, in the same section, that every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket, &c. and shall appear so armed, accoutred and provided, when called out to exercise or into service. . . . The plain effect of the [federal statute is] . . . that all those who are enrolled, are subject and bound to do some important duties, amongst which are the duties of keeping themselves at all times armed and provided, and that of appearing so armed when called out to exercise.¹⁴⁸

The Massachusetts court answered affirmatively that the state may create exceptions to service under the federal militia statute.¹⁴⁹ The telling thing is the analysis. The court's decision is grounded on the federal militia power under Article 1, Section 8, the text of the federal statute, and the practice under it allowing states to create exceptions from service.¹⁵⁰ The court does not even acknowledge the existence of the Second Amendment. If the Second Amendment actually meant what the *Silveira* line of cases said it means, the Massachusetts court's analysis would have rested solidly on Second Amendment grounds.

Alabama 223 would not be as intrusive as the 1838 federal approach. It would make appearance and practice with the rifle voluntary. It would not mandate, but again would make voluntary and would facilitate the purchase of a military style rifle. It would provide for a place to practice and develop proficiency with that rifle, but it would not force the citizen to appear for exercises. It would protect all of the above from infringement by federal law that threatens the places and tools of militia training—the guns and the ranges.¹⁵¹ A state might choose to do more, but Alabama 223 comprises the basic things we

148. *Id.* at 572-73.

149. *Id.* at 576.

150. *Id.* at 575.

151. In this respect, Alabama 223 might conflict with Article 1 Section 8, in the way Kates and Reynolds argue is inevitable under the SRSA. See Reynolds & Kates, *supra* note 84, at 1739 (suggesting that the SRSA is hard to square with the federal and state balance of the constitutional text). But since the States' rights courts have ignored that problem, we must as well. The other, comical option is that a court might first advance the SRSA and then conclude that it does not even confer any state rights beyond those already established in Article 1, Section 8 (thus making the Second Amendment totally superfluous). One can only hope that no court would be willing to go that far. But see Denning, *Can the Simple Cite Be Trusted?*, *supra* note 8, at 962 (criticizing dishonesty of judicial analysis claiming to rely on *Miller*, but actually applying later circuit court authority).

should expect from states under the SRSA.

B. Objections to Second Amendment Protection of Firing Ranges

One superficial issue provides nominal cover for those seeking to uphold federal environmental law against a CMP style state assertion of militia rights. The question is whether a state militia defense against environmental closure of a shooting range is any different from the failing claim of the newspaper publisher that it should be exempt from federal hazardous waste disposal regulations because they burden publishing. The answer is yes. The difference is crucial. Federal environmental laws do not close down newspapers. They increase the cost of operation, as do other regulations and taxation. The regulations do not say that the practice of putting print to page is illegal.

In the context of Alabama 223 the discharge of the projectile into the environment is an open and direct violation of the CWA, RCRA, and CERCLA. These statutes bar the core activity—a state program of bearing of arms—protected by the SRSA.

This is mildly contentious because of divisions about what the Second Amendment means. Arguably, outdoor range closures would not prevent individuals from training for armed self-defense. The option of indoor ranges that would permit practice with inherently lower powered handguns would remain available, and indoor ranges are more manageable from an environmental perspective (though more dangerous for the users who are exposed to greater concentrations of airborne lead). However, rifle practice with say, the M-1 Garand is not viable at an indoor range. Certainly an indoor range would not accommodate the competition and training mandated under the federal CMP to occur each year at Camp Perry, Ohio.¹⁵² But, even if such a range could be found or constructed, restricting rifle shooting to such a place would be the equivalent of closing offending newspapers on the rationale that less offensive ones remain open.

C. Republican Virtue

Even some collective rights theorists implicitly acknowledge the role ranges play in the state centric Second Amendment. For example, David Williams's conception of the Second Amendment exalts republican virtue, that requires the kind of collective training activities that will happen, if at all, in places like shooting ranges.¹⁵³ While Williams ultimately opposes a substantive Second Amendment, his call to republican virtue is one of the first principles a states' rights advocate serious about doctrinal content must embrace. The range is one of the best places in modern America where the republican values of the virtuous

152. See 36 U.S.C. § 40725 (2000); 2003 CMP ANNUAL REPORT, *supra* note 130, at 11 (showing and describing the mile long firing range where CMP national matches have been held since 1907).

153. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 592 (1991).

armed citizenry have a chance of being developed and sustained.¹⁵⁴

The states' rights judges bump against this idea. They acknowledge the framers' preference for the militia over the standing army, even while criticizing the militia as an idealized institution whose military effectiveness was doubted by even those who championed it.¹⁵⁵ The *Silveira* court, for example, painted the entire scene as quaint, idealistic, and probably irrelevant to the modern world.¹⁵⁶ However, the underlying virtues of discipline, responsibility for one's decisions, and awareness of how individual actions can dramatically affect the group remain vital. There is perhaps no other place where community duty, self-discipline, and the intertwined nature of our responsibilities are as clearly illustrated. A breach of community obligations at the range can be disastrous and everyone knows it. It is a venue saturated with guns, and yet a place where one feels secure from the random acts of violence that afflict the public space generally.

D. Bearing Arms, Keeping Arms, and a Militia State of Mind

Alabama 223 would be about the most innocuous possible SRSA-protected bearing of arms. In the extreme, bearing arms connotes confrontation.¹⁵⁷ But at its most basic, bearing arms equates to using and developing proficiency with them, taking the rifle¹⁵⁸ (according to *Silveira*, military rifles) to the place explicitly designed for the safe discharge of it and practicing. Whatever may be the outer limits of "bearing arms," taking a rifle to the range and shooting at a paper target is at its core.

It is possible to object that Alabama 223 is not sufficiently militaristic to satisfy *Silveira*. But that objection would ignore the professed intent of the state legislature, the express decision to facilitate proficiency with military rifles and firing discipline, and the example of the parallel federal program.¹⁵⁹ Moreover, it would be odd indeed for those so obviously concerned about the violence policy implications of the Second Amendment to object that a particular type of arms bearing is not quite militaristic or confrontational enough to qualify under the SRSA.

A similar objection that Alabama 223 does not establish sufficient order, e.g., a structure of officers and protocols, ignores the explicit command of Article I,

154. Kopel & Little, *supra* note 116.

155. *Silveira v. Lockyear*, 312 F.3d 1052, 1078-79 nn.36-37 (9th Cir. 2002).

156. *Id.* at 1076-77 nn.34, 36.

157. *Id.* at 1072-73 (arguing its military connotation).

158. A more innocuous military rifle (those pieces of wood that the junior ROTC uses in parades) would really not be a rifle at all.

159. The 2003 CMP Annual Report notes that the program has been praised for producing higher quality military recruits. 2003 CMP REPORT, *supra* note 130, at 6 (citing a 1966 Department of the Army Study by Arthur D. Little). James Whisker's presentation of the Arthur D. Little report shows that the clear aim of the federal CMP program was militaristic. WHISKER, *supra* note 110 at 38. It is plausible to criticize that the federal CMP is not cost effective. But, no fair assessment can deny its military pedigree. *Id.* See also Kopel & Little, *supra* note 116 at 490.

Section 8 of the Constitution, which reserves to the states the appointment of militia officers and training of the militia according to the discipline prescribed by Congress.¹⁶⁰

Alabama 223 would be entirely consistent with *Miller's* definition of militia. The state's decision to trust its citizens to keep their own arms, some sold to them by the state, some not, would solve the *Silveira* court's difficulty discerning what the Second Amendment possibly could be mean by the word "keep."¹⁶¹ The militia is the body of the people, "expected to appear bearing arms supplied by themselves" which they quite naturally *keep* at home.¹⁶²

160. This ultimately raises the criticism that the SRSA is incoherent; that it cannot be squared with the remaining Constitutional text. *See supra* note 152. If Congress were to order a discipline that trumped the state CMP per Article I, Section 8, would states' rights judges claim that the Second Amendment implicitly repealed Article I, Section 8? If not, then the Second Amendment under the states' rights view is entirely superfluous, adding nothing not already in the constitutional text. *Silveira* seems to conclude that Article I, Section 8 was implicitly repealed by the Second Amendment. "[W]e believe that the most plausible construction of the Second Amendment is that it seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms and forbids the federal government to interfere with such exercise." *Silveira*, 312 F.3d at 1075. This construction strips Congress of its Article I, Section 8 powers and simultaneously grants states much broader militia powers. The problem is there is no evidence that the Second Amendment was designed to repeal Article I, Section 8. William Van Alstyne goes further:

In recent years it has been suggested that the Second Amendment protects the "collective" right of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.

William Van Alstyne, Essay, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1243 n.19 (1994).

161. *Silveira*, 312 F.3d at 1074. After much analysis supporting its view that "bearing" arms is particularly militaristic and thus a state function, the court, perhaps sensing difficulty, concluded, "[t]he reason why [the] term [keep] was included in the amendment is not clear. . . . In the end, however, the use of the term 'keep' does not appear to assist either side in the present controversy." *Id.* The court simply ignored the explanation based on the unambiguous conclusion in *United States v. Miller*, 307 U.S. 174, 178 (1939).

162. *Miller*, 307 U.S. at 179. One clear thing about *United States v. Miller* is its definition of militia. It is consistent with the Court's determination in *Presser v. Illinois*, 116 U.S. 252, 265 (1886), that "the American people" constitute the reserved military force or reserve militia of the United States." It also reflects the federal statutory definition that places the unorganized militia at the base of the hierarchy of American military forces of standing army, national guard, unorganized militia. 10 U.S.C. § 311 (2000). James Whisker's history of the militia shows the militia as citizens armed with their own weapons, useful primarily as a defensive force in venues close to their homes. WHISKER, *supra* note 110 at 2. Even David Williams, though unsympathetic to the Second Amendment, recognizes that the framers considered the entire population the militia.

Members of the Alabama CMP would even satisfy the state of mind requirement of *Cases* through assent to standards established by the state CMP administrator. The state's militia aim would be established explicitly in the preamble to the legislation and through the evident military character of the arms and firing discipline.¹⁶³ Alabama 223 affirms that firing ranges are perhaps the only places where citizens can even come close to the ordered use and training with firearms that seem to be the core of the states' rights view.

D. The Politics and Policy Implications of State Range-Protecting CMPs

So far, citizens have not sought and legislatures have not passed legislation like Alabama 223. This is in part because politically, the individual rights view of the Second Amendment has been on the ascent. Tens of millions of Americans think they have a right to arms and savvy operators have concluded that for now, gun prohibition is a loser political issue.¹⁶⁴ But things change. If the states' rights view eventually carries the day, we should not doubt that in a society where on average there is a gun in every other house,¹⁶⁵ representative legislatures will pass laws that reflect the range-protection/CMP measures described in Alabama 223. Indeed, even without a shift in favor of gun prohibition, the growing threat of federal environmental closure of ranges may alone be enough to prod legislatures toward 223 style laws. Certainly range-protecting CMP legislation is a small step to take for a legislature that already has debated and passed concealed carry legislation, barred municipal law suits against gun makers, preempted local gun control measures, affirmed an unambiguous constitutional right to individual firearms, or immunized ranges from noise nuisance and lead contamination closure.

If the SRSA will not uphold state range-protecting CMP legislation against conflicting federal laws, then it is time to call the SRSA a fraud.¹⁶⁶ But if it does

For Williams it is the failure to achieve the ideal, a consequence of individual choices to eschew arms and political choices to abandon militia discipline, that renders the Second Amendment anachronistic. Williams, *supra* note 153, at 588-90.

163. See 2003 CMP ANNUAL REPORT, *supra* note 130.

164. Witkin, *supra* note 12, at 24 (reporting that 86% of men and 67% of women support the right to individual gun ownership). Typically candid James Carville has said, "I don't think there is a Second Amendment right to own a gun. But I think it's a loser political issue." Chris W. Cox, *Don't Be Fooled*, THE AM. RIFLEMAN, Oct. 2002, at 22. See also Evelyn Theiss, *Gun Lobby Shot Down Democrats in Congress*, PLAIN DEALER (Cleveland), Jan 14, 1995, at 1A ("[T]he fight for the assault-weapons ban cost 20 members their seats in Congress . . . The NRA is the reason the Republicans control the House.") (quoting President Clinton); Departing California Congressman Anthony Beilens said this: "We unnecessarily lost good Democratic members because of their votes on the Brady bill and semiautomatic assault weapon ban. . . . [T]hey will have but a modest effect out there in the real world. It was not worth it at all." Greg Pierce, *Inside Politics*, WASH. TIMES, Nov. 9 1995, at A6.

165. See *supra* note 112.

166. Compare *Silveira*, 312 F.3d at 1063 (quoting Warren Burger, *The Right to Bear Arms*,

contain enough substance to uphold such legislation, what are the other policy implications and how do they compare to the evident problems of the *de facto* right to arms environment in which we now operate?

First, while most would acknowledge that the bulk of existing federal gun control legislation is valid under the individual rights view,¹⁶⁷ a substantive SRSA is more problematic. One of the core federal regulatory principles of modern gun control would not survive even as a superficial matter. The BATF's "suitable for sporting use" regulatory import criteria, drawn from the 1968 Gun Control Act,¹⁶⁸ would fall quickly in the face of a state CMP focused on providing citizen access to militia rifles. A congressional ban on "assault rifles" also would fall to the recognition that the core value of the SRSA is to permit states to equip their citizens with military style rifles.¹⁶⁹

On the other hand, the SRSA might permit a total ban on any handguns not explicitly protected by state CMP legislation. One can imagine a federal/state dispute where Washington aims to ban a class of handguns, arguing that they have no militia use, and a state decides to provide access to them under its CMP. It is unclear whether a court should apply an objective standard, meaning that the state's designation of a weapon as militia type would not automatically make it so. The court might instead consider what handguns are and have been used by military forces and perhaps even the liberty taken by officers to carry non-regulation sidearms. But that fair dispute is in sharp contrast to the state decision to give citizens access to semiautomatic versions of basic infantry rifles on a list of banned assault weapons. Whether by state designation or objective assessment, these rifles are the primary tools protected under the SRSA.

Other questions would be more difficult. Might existing state legislation authorizing concealed carry be incorporated into CMP legislation? Would such a measure trump federal efforts to control access to particular handguns or concealed carry generally?

These state/federal conflicts will not appear everywhere. They are less likely to emerge in "blue" America and more likely to appear in "red" America - places that have robust gun cultures where legislatures already have passed liberalized concealed carry and other gun rights legislation. Blue America, under full-blown federal gun control legislation, might move closer to the *de jure* disarmament

PARADE MAG., Jan. 14, 1990, at 4 (claiming the individual rights view is a fraud)).

167. The Fifth Circuit decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), is a good example. While the Court recognized an individual right to arms, Mr. Emerson was recently sentenced to two and one half years in prison for violating a federal gun law the court said remains valid under the individual rights view. See *Ex-husband Sentenced to Prison on Gun Charge*, DESERET NEWS (Salt Lake City), Jan. 25, 2003, at A9.

168. 18 U.S.C. §§ 921-931 (2000). See also *United States v. Posnjak*, 457 F.2d 1110 (2d Cir. 1972).

169. Congress amended the 1968 Gun Control Act with the Crime Control Act of 1994, adding restrictions on the sale of certain magazine fed, centerfire, semiautomatic rifles. 18 U.S.C. §§ 921-922. A summary of the 1994 Act appears in *National Rifle Ass'n v. Magaw*, 132 F.3d 272 (6th Cir. 1997). The ban expired in 2004.

similar to the Washington, D.C. model so admired by gun control advocates. In red America, and relatively split states,¹⁷⁰ citizens might enjoy even greater access to arms than they have now.

Calls would continue for legislation limiting access to firearms in red states, so as to lessen black or gray market traffic of arms from there into blue states.¹⁷¹ However, under the SRSA a state's interest in providing its citizens access to militia arms would weigh heavily against the validity of federal legislation. Thus, currently advocated gun control measures aimed at reducing the flow of firearms from easier access states to more difficult access states—*e.g.*, the one gun a month proposal that might survive scrutiny under the individual rights view, would be more quickly struck down in the face of conflicting state CMP legislation.

Even aspects of the 1934 Gun Control Act stand weaker against a conflicting state CMP advanced under the SRSA.¹⁷² The 1934 Act is the primary federal statute that restricts ownership of machine guns. It controls ownership through registration, taxation, tracking regulations and related amendments that restrict manufacture of new machine guns,¹⁷³ but does not absolutely bar citizens from having fully automatic firearms. A state statute giving citizens greater access to machine guns or simply permitting manufacture of new ones subject to the existing scheme of federal regulations is exactly the type of legislation the SRSA would uphold against federal infringement.

Congress might make a plausible case of commerce power to regulate sporting firearms and that might include some that are marginally suitable for military use.¹⁷⁴ But, primary protection of the SRSA would extend to exactly the set of firearms that have been attacked for their purported lack of sporting qualities. Under the SRSA, pistol grips, bayonet lugs, flashiders, folding stocks, and other evil accouterments would be transformed into reliable signals of SRSA

170. Blue Philadelphia and Pittsburgh border a Red "T" comprising the northern half and center of the state, meaning that Pennsylvania's designation may hinge partly on general turn-out and partly on whether a particular election has more deeply spurred the state's large population of hunters and NRA members or its urban population. This assessment ignores the interesting group of voters who span both categories.

171. I use gray market here to suggest that we might disagree about how to categorize honest people who seek access to contraband weapons for self-defense. I have argued elsewhere that even without the Second Amendment, we might extract an individual right to arms for self-defense from the Ninth Amendment. Since the Ninth Amendment affirms rather than creates rights, whether courts or Congress have recognized the right might be beside the point. *See* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

172. *See* Reynolds & Kates, *supra* note 84, at 1749-57 (explaining how taking states' rights seriously leads to the conclusion that state legislation following, for example, the Swiss model of citizens keeping state provided automatic rifles, would trump conflicting federal legislation).

173. Pub. L. No. 73-474, 48 Stat. 1236. *See also* Kopel & Little, *supra* note 116, at 542-43 nn.572-74.

174. This is the lament in *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

protected firearms.

There are many other vexing questions imbedded in any guarantee of a state right to arms. Many seem very distant. The states' rights view raises the question whether states may possess highly destructive weapons. It poses a slightly more realistic version of the absurdity that is often levied against the individual rights view—*viz*, are states permitted by the Second Amendment to have and perform tests with nuclear weapons?¹⁷⁵ Equally remote, at least today, does bearing arms mean that states are permitted to form highly lethal military units to conduct maneuvers as a show of muscle (a sort of domestic gun-ship diplomacy using Blackhawk helicopters instead of dreadnaughts) with the intent of influencing Washington in some state/federal conflict?

It is easy to imagine other difficulties generated by a substantive SRSA. It is difficult though, to understand why gun prohibitionists or anyone else would automatically prefer this basket of problems to those that accompany our current environment of *de facto* individual rights.

CONCLUSION

The states' rights Second Amendment remains the dominant view of the lower federal courts. For the moment no state legislation has emerged to precisely test its content. But things change. The same states that have adopted a host of gun rights legislation eventually may see range-protecting CMP statutes as proper and necessary supplements to their existing laws. If the lower federal courts honestly apply the states' rights doctrine they have developed over the last sixty years, these state CMP laws will trump a variety of conflicting federal statutes. Perhaps those who have bet heavily that the SRSA will facilitate the wave of gun control measures they pine for should reconsider.

175. In contrast, the arms protected under the individual rights view might very plausibly be limited to those commonly held by individual citizens with an upper boundary of the standard issue infantry rifle.

NOTES

CAN FEDERAL REGULATIONS *EVER* CREATE FEDERAL RIGHTS PRIVATELY ENFORCEABLE UNDER SECTION 1983?

ANDREW L. CAMPBELL*

INTRODUCTION

In 2002, the Central Puget Sound Regional Transit Authority planned to build a light-rail line connecting northern Seattle neighborhoods with Sea-Tac Airport.¹ The proposed route was to pass through several neighborhoods, including Rainier Valley, a Seattle neighborhood populated predominantly by minority residents.² The near five mile segment passing through Rainer Valley was to be built at street level, while the segments passing through other neighborhoods were to be elevated above street level, or to be built underground.³ Save Our Valley ("SOV"), a community group, filed suit under 42 U.S.C. § 1983⁴ alleging that the street-level alignment through Rainer Valley would cause a disproportionate adverse impact on minority residents, including the taking of residential and commercial properties, the displacement of community facilities, the disruption of business, and safety problems, in violation of a Department of Transportation "disparate impact" regulation.⁵

The regulation, promulgated pursuant to Title VI of the Civil Rights Act of 1964, prohibited recipients of federal funds (like Sound Transit) from taking

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1. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 934 (9th Cir. 2003).

2. *Id.*

3. *Id.*

4.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2000).

5. *Save Our Valley*, 335 F.3d at 934-35 (citing 49 C.F.R. § 21.5(b)(2)).

actions having the effect of discriminating on the basis of race.⁶ The DOT regulation, however, went beyond the explicit language of the statute: the regulation proscribed activities having a disparate impact on racial groups while the enabling legislation prohibited only intentional discrimination.⁷

Nevertheless, SOV argued that this DOT regulation created an individual federal right privately enforceable under § 1983.⁸ The district court disagreed, holding that the regulation did not create such a right, and granted summary judgment to Sound Transit.⁹ The Ninth Circuit affirmed, and in the process confirmed what commentators¹⁰ have viewed as the inevitable result of recent Supreme Court rulings in *Alexander v. Sandoval*¹¹ and *Gonzaga University v. Doe*:¹² agency regulations alone can *never* create rights privately enforceable under § 1983.¹³

Despite the Ninth Circuit's conclusion, the Supreme Court has never directly ruled on whether an agency regulation alone can go beyond the explicit language of a statute to establish a right enforceable under § 1983.¹⁴ Prior to *Sandoval* and *Gonzaga*, several circuit courts had held that regulations alone may indeed create rights enforceable under § 1983.¹⁵ In the face of the corrosive effects of *Sandoval* and *Gonzaga*, these cases remain as spirited reminders that federal rights, including those born of regulatory agencies, are presumptively enforceable under § 1983. This Note will analyze the effect of the *Sandoval* and *Gonzaga* decisions upon § 1983 actions which seek to enforce federal regulations. Specifically, this Note will argue that the majority opinion in *Save Our Valley* misapplied Supreme Court precedent, failed to consider contemporary administrative law principles, and failed to give § 1983 broad construction, when it concluded that regulations alone can never create enforceable rights under § 1983.

While legal scholars have paid little attention to this weighty question,¹⁶ its

6. *Id.* at 935.

7. *Id.* at 935 n.1. In *Guardians Ass'n v. Civil Service Commission of New York*, 463 U.S. 582, 584 n.2 (1983), five Justices voted to uphold similar disparate impact regulations. Such regulations, therefore, remain valid despite the proscription of activity allowed under the enabling legislation. See *Save Our Valley*, 335 F.3d at 960 n.10 (Berzon, J., dissenting in part).

8. *Save Our Valley*, 335 F.3d at 935.

9. *Id.*

10. Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613; Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1461 (2003).

11. 532 U.S. 275 (2001).

12. 536 U.S. 273 (2002).

13. *Save Our Valley*, 335 F.3d at 939.

14. Mank, *supra* note 10, at 1460.

15. *Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994); *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985).

16. Davant, *supra* note 10, at 614.

possible implications have been described as “enormous,”¹⁷ and of “singular importance.”¹⁸ If the Supreme Court concludes that federal agency regulations can never create federal rights enforceable through § 1983, many federal regulations having the “force and effect of law,”¹⁹ including proscriptions relating to racial discrimination and environmental degradation, may nevertheless be privately unenforceable.²⁰ Beyond its consequence to the enforcement of certain federal laws, this question has broader implications concerning the definition and distinction of federal rights and available remedies for their violation.²¹ It further implicates separation of powers concerns and the proper function of the executive branch in the legislative process.²² Ultimately, if the Supreme Court should hold that agencies cannot create privately enforceable rights, the presumptive enforceability of certain kinds of statutory rights through § 1983 will be undermined, seriously harming civil liberties.²³

Part I of this Note begins with a brief review of the history and origins of § 1983. This part then addresses the application of § 1983 to statutory rights, the standard for applying § 1983 to statutory rights, and the exceptions recognized by the Supreme Court in limiting § 1983 to statutory rights. Part I concludes with an analysis of the Supreme Court’s recognition that § 1983 may enforce statutory rights even absent an explicit or implicit private right of action.

Part II of this Note follows the early development of § 1983 actions which sought to enforce regulatory laws. This part then acknowledges the circuit split that developed over whether an agency regulation may create a federal right enforceable under § 1983. Part III turns to the merger of rights-creating analyses predicate to implied rights of action and § 1983 actions in *Sandoval* and *Gonzaga*.

Part IV of this Note addresses the Ninth Circuit decision that agency regulations can never create rights enforceable under § 1983. This part analyzes the majority opinion’s interpretation of *Sandoval* and *Gonzaga*. Part IV concludes that the majority extends *Sandoval* and *Gonzaga* beyond their holdings, fails to take into consideration contemporary notions of administrative law, including the *Chevron* and *Chrysler* doctrines, and fails to give § 1983 its required broad interpretation.

17. *South Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001) (noting its importance with regard to Title VI disparate impact regulations).

18. *Davant*, *supra* note 10, at 613.

19. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979).

20. *See Davant*, *supra* note 10, at 613.

21. *Mank*, *supra* note 10, at 1420.

22. *See Davant*, *supra* note 10, at 613.

23. *Mank*, *supra* note 10, at 1420.

I. HISTORY AND APPLICATION OF § 1983

A. *Origins of § 1983*

The Reconstruction Era following the Civil War signified a fundamental change in American political philosophy,²⁴ brought on by a radical shift in the balance of power between the federal and state governments.²⁵ Prior to the Civil War, state autonomy was championed, owing to a belief that individual and states' rights would be threatened by too powerful a central government.²⁶ In the aftermath of the war, this earlier theory of federalism was discredited.²⁷ As Confederate attempts to restore white supremacy in the South led to the continued persecution of emancipated African-Americans,²⁸ the federal government, motivated by a Reconstructionist Congress led by abolitionists with strong federalist and nationalist tendencies,²⁹ became the protector of individual rights against state and private action.³⁰ This novel role became manifest with the passage of the Civil Rights Act of 1871.³¹

Section 1983 has its origins in section 1 of the Civil Rights Act of 1871, the Ku Klux Klan Act.³² The Act created a private cause of action for the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution of the United States."³³ As the name suggests, the 1871 Act was the national government's attempt to restrain the "organized terrorism" of the Klan and its sympathizers.³⁴ The Act, however, guaranteed only constitutional rights, privileges, and immunities and did not count statutory rights among those it protected.³⁵

B. *Addition of "and laws" to § 1983*

With the comprehensive revision and codification of the United States statutes in 1874, Congress added the phrase "and laws" to section 1 of the Civil

24. Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS. L. REV. 283, 303 (1996).

25. Paul Wartelle & Jeffrey Hadley Loudon, *Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy*, 9 HASTINGS CONST. L.Q. 487, 504 (1982).

26. Key, *supra* note 24, at 303.

27. *Id.*

28. Mank, *supra* note 10, at 1427.

29. Wartelle & Loudon, *supra* note 25, at 504.

30. *Id.*

31. *Id.* at 505.

32. *Id.*

33. Civil Rights Act of 1871, Ch. 22, § 1, 17 Stat. 13 (1871).

34. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 611 n.25 (1979); see also Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws"*, 67 GEO. WASH. L. REV. 51, 55-56 (1998).

35. Key, *supra* note 24, at 304.

Rights Act.³⁶ Although the statutory revisions were meant only to “clarify existing law rather than to amend it,”³⁷ when Representative Lawrence read the new provisions aloud on the floor of the House of Representatives, he noted that the revised provisions “possibly [show] verbal modifications bordering on legislation,”³⁸ and in some cases may in fact operate differently from the old provisions.³⁹ Nevertheless, there was no specific discussion regarding the term “laws,”⁴⁰ and thus it was unclear whether Congress intended a substantive change of the statute.⁴¹

Whether and how any substantive change should be interpreted from the addition of the “and laws” language has spawned great debate, generally categorized into three main theories.⁴² First, advocates of the “Consistency Theory” contend that the revisers intended for the provisions of the Civil Rights Act to be consistent.⁴³ Proponents of this theory read the “laws” language in light of the entire Act, and limit its meaning to “laws providing for equal rights.”⁴⁴ Second, supporters of the “No Modification Theory” believe that the changes should be viewed as a clarification of prior law, not as a modification of it.⁴⁵ Like the consistency theory, proponents of no modification read “laws” as referring to only those “laws providing for equal rights.”⁴⁶ Third, others suggest a “Plain Language Theory,” arguing that “and laws” should be given its plain and literal meaning to include any federal law or statute.⁴⁷

In *Chapman v. Houston Welfare Rights Organization*,⁴⁸ the Supreme Court weighed in on the debate over the “and laws” language. The Court held that 28 U.S.C. § 1343(3) did not give federal jurisdiction over violations of statutory rights that did not secure “equal rights.”⁴⁹ Although the Court did not explicitly address the question of whether the “laws” language of § 1983 applied to statutory violations, Justices Powell and White vigorously debated the tangential

36. Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 402 (1982).

37. Key, *supra* note 24, at 304.

38. *Maine v. Thiboutot*, 448 U.S. 1, 7-8 (1980) (citing 2 CONG. REC. 827 (1874)).

39. Key, *supra* note 24, at 304.

40. *Id.*

41. See Mank, *supra* note 10, at 1427.

42. Key, *supra* note 24, at 306.

43. *Id.* at 307.

44. *Id.*

45. *Id.* at 307-08.

46. *Id.* at 308.

47. *Id.* at 310.

48. 441 U.S. 600 (1979).

49. *Id.* at 603 (citing 28 U.S.C. § 1343(3) which provided: “The district courts shall have original jurisdiction . . . [t]o redress the deprivation, under color of any State law . . . any right, privilege or immunity secured by the Constitution of the United States or any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.”).

§ 1983 issue in their respective concurring opinions.⁵⁰ Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concluded that to remain consistent with the 1871 Act, “and laws” should be read as shorthand for “and laws providing for equal rights.”⁵¹ Although Justice Powell acknowledged the lack of definitive legislative history concerning the “laws” language, he nevertheless concluded that the “history of the revision makes abundantly clear that Congress did not intend . . . to alter the content of federal statutory law.”⁵² In addition to his consistency and no modification arguments, Justice Powell expressed concern that a plain language interpretation, allowing for the enforcement of *any* federal statutory right, would grant federal jurisdiction over virtually every federal funding provision, even without Congressional approval.⁵³

Justice White, on the other hand, emphasized a “straightforward and natural reading of [§ 1983’s] language.”⁵⁴ Thus, he concluded that § 1983 provides a remedy for federal statutory as well as constitutional rights.⁵⁵ In dissent, Justices Stewart, Brennan, and Marshall agreed with Justice White’s plain language interpretation.⁵⁶

C. Application of § 1983 to Statutory Rights

One year later, in *Maine v. Thiboutot*,⁵⁷ the Court directly faced the proper interpretation of the “and laws” language contained in § 1983. In that case, the Court considered whether the deprivation of welfare benefits to which Mr. Thiboutot was indisputably entitled under the federal Social Security Act gave rise to a § 1983 claim.⁵⁸ In addressing whether § 1983 encompassed claims based on purely statutory violations of federal law,⁵⁹ Justice Brennan opined for a majority of the Court that “the plain language of [§ 1983] undoubtedly embraces [Thiboutot’s] claim that [the State of Maine] violated the Social Security Act.”⁶⁰ Justice Brennan’s plain language interpretation focused on Congress’s failure to attach any modifiers to the phrase “and laws.”⁶¹ Although Justice Brennan emphasized that “the legislative history does not permit a definitive answer,”⁶² he bolstered his plain language reasoning with a

50. *Id.* at 623 (Powell, J., concurring); *id.* at 646 (White, J. concurring).

51. *Id.* at 624 (Powell, J., concurring).

52. *Id.* at 625 (Powell, J., concurring).

53. *Id.* at 645 (Powell, J., concurring).

54. *Id.* at 649 (White, J., concurring).

55. *Id.*

56. *Id.* at 674 (Stewart, J., dissenting).

57. 448 U.S. 1 (1980).

58. *Id.* at 2-3.

59. *Id.* at 3.

60. *Id.* at 4.

61. *Id.* “Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended.” *Id.* at 8.

62. *Id.* at 7.

comprehensive record of the Court's several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of both federal statutory and constitutional law.⁶³ Finally, he noted that any limitations to be inferred from the language of § 1983 could best be addressed by Congress, which importantly remained silent despite the Court's many pronouncements on the scope of § 1983.⁶⁴ In short, the Court's explicit holding resolved the conflict over the "and laws" language of § 1983, concluding that such language does not constrain the § 1983 remedy to violations of rights protected by the Constitution and federal equal protection laws but implicates violations of rights protected by statutory law as well.⁶⁵

In dissent, Justice Powell, again joined by Chief Justice Burger and Justice Rehnquist,⁶⁶ vigorously reiterated his stance from *Chapman*: "[T]he historical evidence . . . convincingly shows that the phrase ["and laws"] . . . was—and remains—nothing more than a shorthand reference to equal rights legislation enacted by Congress."⁶⁷ To read that phrase more broadly, Justice Powell scolded, "is to ignore the lessons of history, logic, and policy."⁶⁸ The dissent then engaged in a lengthy analysis, first refuting the majority's "casual" plain language interpretation,⁶⁹ and then turning to the historical evidence surrounding § 1983's enactment,⁷⁰ the weighty policy and pragmatic consequences of the Court's holding,⁷¹ and finally the majority's treatment of the Court's § 1983 precedents.⁷²

D. The Availability and Scope of Enforcing Statutory Rights Under § 1983

The year after *Thiboutot*, the Court began to rein in the availability of § 1983 statutory causes of action.⁷³ In *Pennhurst State School and Hospital v. Halderman*,⁷⁴ the Court considered whether an implied cause of action existed in a grant-in-aid statute.⁷⁵ Specifically, the Court was asked whether the patients' "bill of rights" provisions of the Developmentally Disabled Assistance and Bill of Rights Act (DDA) created substantive and enforceable rights in favor of the

63. *Id.* at 4. *Thiboutot*, therefore, was essentially a *stare decisis* decision. See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 961 n.12 (9th Cir. 2003) (Berzon, J., dissenting in part).

64. *Thiboutot*, 448 U.S. at 8.

65. *Id.* at 4.

66. *Id.* at 11.

67. *Id.* at 12; see *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 624 (1979) (Powell, J., concurring).

68. *Thiboutot*, 448 U.S. at 12.

69. *Id.* at 11-12.

70. *Id.* at 14.

71. *Id.* at 19.

72. *Id.* at 26.

73. See *Key*, *supra* note 24, at 324; see also *Pettys*, *supra* note 34, at 68.

74. 451 U.S. 1 (1981).

75. *Id.* at 5.

mentally challenged to bring suit to compel states to comply with certain requisite standards for receiving federal funds.⁷⁶ Justice Rehnquist, writing for the majority, concluded that the bill of rights provisions calling for "appropriate treatment" in the "least restrictive environment" constituted mere "precatory" treatment standards, not detailed conditions requisite to the receipt of federal moneys, and thus did not implicitly create any enforceable rights.⁷⁷ The Court emphasized that private enforcement, against a state, of a condition in a federal grant-in-aid statute requires that Congress "speak with a clear voice" to create the condition "unambiguously."⁷⁸ More importantly, however, the Court remanded the case to the Third Circuit to determine whether other provisions in the Act were enforceable under § 1983.⁷⁹

In the advisory portion of his opinion, Justice Rehnquist implied two limitations on § 1983 actions brought to enforce statutory rights.⁸⁰ First, he suggested that a § 1983 action must be based on the violation of specific statutory rights.⁸¹ Second, he emphasized Justice Powell's dissent in *Thiboutot* which suggested that § 1983 would not be available where the "governing statute provides an exclusive remedy for violations of its terms."⁸² Under the DDA, for example, the agency had the exclusive remedial power of withholding funds when states failed to comply with the necessary conditions.

Justices Blackmun, White, Brennan, and Marshall filed separate opinions, noting their disagreement with Justice Rehnquist's advisory opinion.⁸³ Justice Blackmun concurred in the Court's judgment, but refused to join the Court's advisory discussion which appeared to have a "negative attitude" toward future positive holdings in favor of private plaintiffs seeking to enforce rights created by the DDA.⁸⁴ Justice White, joined by Justices Brennan and Marshall, concluded that the bill of rights provisions created enforceable rights,⁸⁵ and that *Thiboutot* created a presumption that federal statutory rights may be enforced under § 1983, even where Congress provided for the federal agency to disapprove a State's plan for violations of the terms of the Act.⁸⁶ Although the

76. *Id.*

77. *Id.* at 17-18; see *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987) ("In *Pennhurst*, a § 1983 action did not lie because the statutory provisions were thought to be only statements of findings indicating no more than a congressional preference—at most a nudge in the preferred direction, and not intended to rise to the level of an enforceable right.") (internal citations and quotations omitted).

78. *Pennhurst*, 451 U.S. at 17.

79. *Id.* at 30.

80. *Id.* at 28.

81. *Id.*; see *Mank*, *supra* note 10, at 1435.

82. *Id.* (quoting *Maine v. Thiboutot*, 448 U.S. 1, 22 n.11 (1980) (Powell, J., dissenting)).

83. *Id.* at 32 (Blackmun, J., concurring); *id.* at 33 (White, J., dissenting in part, joined by Justices Brennan and Marshall).

84. *Id.* at 32 (Blackmun, J., concurring).

85. *Id.* at 35 (White, J., dissenting in part).

86. *Id.* at 51 (White, J., dissenting in part).

Court did not explicitly decide the § 1983 issue, *Pennhurst* exhibited the Court's deep divisions regarding the availability and scope of enforcing statutory rights through § 1983.

1. *Violation of a Statutory Right as a § 1983 Predicate.*—After *Pennhurst*, the Court elaborated upon the two limitations in Justice Rehnquist's majority opinion. In *Golden State Transit Corp. v. City of Los Angeles*⁸⁷ and *Blessing v. Freestone*,⁸⁸ the Court defined the standard for which types of federal statutory rights are enforceable under § 1983. In *Golden State*, the Court noted that a § 1983 suit must assert the violation of a federal right.⁸⁹ "Section 1983," the Court stated, "speaks in terms of 'rights, privileges, or immunities,' not violations of federal law."⁹⁰ In *Blessing*, the Court identified three factors to be considered when deciding whether a federal right had been violated: first, Congress must have intended that the provision in question benefit the putative plaintiff;⁹¹ second, the plaintiff must show that the right assertedly protected is not so "vague and amorphous" that its enforcement would strain judicial competence;⁹² and third, the statute must unambiguously impose a binding obligation on the States.⁹³ That is, following *Pennhurst*, the asserted right must be "couched in mandatory, rather than precatory, terms."⁹⁴

Under *Blessing*, even if the plaintiff is able to show that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983.⁹⁵ Because the Court's statutory rights inquiry is rooted in congressional intent, the defendant may demonstrate that Congress intended to foreclose the § 1983 remedy with respect to specific statutory provisions.⁹⁶

2. *Congressional Foreclosure of the § 1983 Remedy.*—In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,⁹⁷ the Court confirmed that Congress may foreclose a § 1983 remedy for violations of statutory rights.⁹⁸ In *Sea Clammers*, the Court was faced with the question of whether the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act implicitly created enforceable rights.⁹⁹ After holding that

87. 493 U.S. 103 (1989).

88. 520 U.S. 329 (1997).

89. *Golden State*, 493 U.S. at 106.

90. *Id.* (quoting 42 U.S.C. § 1983) (emphasis added).

91. *Blessing*, 520 U.S. at 340.

92. *Id.*

93. *Id.* at 341.

94. *Id.* (citing *Pennhurst State Sch. & Hop. v. Halderman*, 451 U.S. 1, 17 (1981) (discussing whether Congress created obligations giving rise to an implied cause of action)).

95. *Id.*

96. *Id.*

97. 453 U.S. 1 (1981).

98. *Id.* at 20.

99. *Id.* at 12.

Congress did not intend to create an implied right of action under the Acts,¹⁰⁰ Justice Powell addressed whether the Acts created statutory rights enforceable under § 1983.¹⁰¹ Citing *Pennhurst*, Justice Powell noted that in addition to the rights requirement, § 1983 actions for violations of statutory rights were subject to an additional exception: "whether Congress had foreclosed private enforcement of that statute in the enactment itself."¹⁰²

The Court indicated that Congress may explicitly prohibit recourse to § 1983 in the statute itself.¹⁰³ The Court further explained that Congress can implicitly forbid recourse to § 1983 "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983."¹⁰⁴ Thus, when a state official is alleged to have violated a federal statute which provides for its own comprehensive enforcement mechanism, the requirements of that enforcement scheme may not be bypassed by bringing suit directly under § 1983.¹⁰⁵

E. Section 1983 Enforces Statutory Rights Even Absent Congressional Approval of a Private Right of Action

Despite an emerging antagonism toward the broad application of § 1983 suits, in *Wilder v. Virginia Hospital Ass'n*,¹⁰⁶ the Court recognized that an alleged statutory rights violation is presumptively enforceable under § 1983 even if Congress did not create a statutory remedy, and the statute itself did not create an implied right of action.¹⁰⁷ In *Wilder*, the Court considered whether a health care provider could bring a § 1983 suit to challenge the method by which a state reimburses health care providers under the Boren Amendment to the Medicaid Act.¹⁰⁸ Under the Act, the Federal Government provides financial assistance to states so that they may provide medical care to impoverished patients. Despite the voluntary nature of the program, states are required to comply with certain requirements imposed by the Act, including a "plan for medical assistance" approved by the Secretary of Health and Human Services.¹⁰⁹ The Boren Amendment provides that a state's plan for reimbursing health care providers must "provide . . . for payment . . . of the hospital services . . . which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and

100. *Id.* at 18.

101. *Id.* at 19.

102. *Id.*

103. *See* *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

104. *See Clammers*, 453 U.S. at 20.

105. *Id.*

106. 496 U.S. 498 (1990).

107. *Id.* at 509-10.

108. *Id.* at 501-02.

109. *Id.* at 502 (citing 42 U.S.C. § 1396a(a) (1982 Supp. V)).

economically operated facilities.”¹¹⁰ The Virginia Hospital Association (VHA) filed suit alleging that Virginia’s plan for reimbursement violated this provision because the rates were not “reasonable and adequate” to provide care.¹¹¹

In holding that the Act created a substantive statutory right to “reasonable and adequate” reimbursement rates enforceable by health care providers under § 1983,¹¹² the Court concluded that whether § 1983 provides a cause of action for violation of federal statutes is a “different inquiry” than “determining whether a private right of action can be implied from a particular statute.”¹¹³ To determine whether a statute creates an implied right of action, courts apply the four-factor test established in *Cort v. Ash*:¹¹⁴ (1) whether the plaintiff is a member of the class for whose special benefit the statute was enacted; (2) whether there is any evidence of legislative intent, explicit or implicit, to either create or deny a private remedy; (3) whether the statute is consistent with the underlying legislative scheme to imply a private remedy; and (4) whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law.¹¹⁵

The *Cort* implied right of action test is grounded in two separation of powers concerns.¹¹⁶ First, Justice Powell in his dissenting opinion in *Cannon v. University of Chicago*,¹¹⁷ noted that to interpret a right of action into a statute, without express language, conflicts with the principle that “[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation.”¹¹⁸ If federal courts were permitted to simply imply a cause of action to enforce statutory rights willy-nilly, it would conflict with the exclusive authority of Congress under Article III to set the limits of federal jurisdiction.¹¹⁹ Thus, whenever federal courts rely on an implied cause of action for their source of jurisdiction, they arguably usurp Congress’s authority.¹²⁰ Justice Powell emphatically warned his fellow Justices that “we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist.”¹²¹ Otherwise, “the legislative process with its public scrutiny and participation has

110. *Id.* at 502-03 (citing 42 U.S.C. § 1396a(a)(13)(A)).

111. *Id.* at 503.

112. *Id.* at 523.

113. *Id.* at 509 n.9.

114. 422 U.S. 66, 78 (1975).

115. *Id.*; see *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979) (requiring that the right of action be “phrased in terms of the persons benefited”).

116. Key, *supra* note 24, at 299.

117. 441 U.S. 677.

118. *Id.* at 747 (Powell, J., dissenting) (quoting *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951)).

119. *Id.* (citing U.S. CONST. art. III, § 3); see Mank, *supra* note 10, at 1439-40; Key, *supra* note 24, at 299.

120. Key, *supra* note 24, at 299.

121. *Cannon*, 441 U.S. at 749 (Powell, J., dissenting).

been bypassed, with attendant prejudice to everyone concerned."¹²²

Second, implied rights of action threaten the exclusivity of Congress's power to interfere with the lawmaking powers of the states.¹²³ The separation of powers is at least partially a means of safeguarding states' rights.¹²⁴ It follows that, because Congress is the only branch in which the states are represented, Congress alone should have the power to impose a federal rule of law on areas that are traditionally relegated to the states.¹²⁵ Consequently, implying a private cause of action against a state, absent express congressional authorization, would constitute an unconstitutional intrusion on the state's powers.¹²⁶

Distinct from implied rights of action, the *Wilder* Court noted that § 1983 provides an "alternative source of *express* congressional authorization of private suits," and thus the separation of powers concerns that accompany implied rights of action are absent.¹²⁷ Section 1983 does not create substantive rights.¹²⁸ Rather, it is a self-contained remedy that provides access to federal courts whenever a citizen is subject to the deprivation of a right secured elsewhere by the Constitution and laws of the United States.¹²⁹ In effect, Congress is presumed to legislate against the background of § 1983, and must contemplate the private enforcement of relevant statutes.¹³⁰ Consequently, unless Congress has affirmatively withdrawn the § 1983 remedy, a plaintiff is not required to demonstrate that Congress specifically intended the statutory right to be enforceable under § 1983.¹³¹ The *Wilder* Court, therefore, delineated a clear demarcation between rights and remedies, and in turn determined that, as a matter of reason, a different standard applies for implied rights of action cases than for § 1983 suits.¹³²

In dissent, Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy, concluded that the text of the Boren Amendment did not clearly confer any substantive rights on Medicaid service providers.¹³³ While the dissenters were on common ground with the majority's discussion of the differing standards

122. *Id.* at 743 (noting that "the intended beneficiaries of the legislation are unable to ensure the full measure of protection their needs may warrant," and "those subject to the legislative constraints are denied the opportunity to forestall through the political process potentially unnecessary and disruptive litigation").

123. *Key*, *supra* note 24, at 299.

124. *Id.*

125. *Id.* at 299-300.

126. *Id.* at 300.

127. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) (emphasis in original) (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981)).

128. *Id.*

129. *Id.*

130. *Id.*; see *Samuels v. District of Columbia*, 770 F.2d 184, 193 (D.C. Cir. 1985).

131. *Wilder*, 496 U.S. at 509 n.9.

132. *Id.* Implied right of action analysis requires a showing that both a right and a remedy exist. Under § 1983 analysis, the only required showing is that a right exists.

133. *Id.* at 527 (Rehnquist, J., dissenting).

that attach to implied rights of action and § 1983 actions, they foreshadowed the *Sandoval* and *Gonzaga* decisions, noting that “a significant area of overlap [between § 1983 and implied right of action suits] remained.”¹³⁴ Jurisdiction under both causes of action rely on language conferring identifiable enforceable rights. Thus, like implied rights of action, the § 1983 remedy is only available where Congress intended for the “statutory provision to rise to the level of an enforceable right.”¹³⁵ Here, Chief Justice Rehnquist argued, the statutory language merely established one of the many conditions for receiving Medicaid funds, not any substantive right to reasonable and adequate reimbursement rates.¹³⁶ The dissent’s focus on unambiguous congressional intent would inform the Court’s application of § 1983 to regulatory law.

II. THE DEVELOPMENT OF REGULATORY LAW AND § 1983

Congress commonly relieves the burden of effectuating broad policy goals by enacting expansive, undefined statutes, and delegating the process of filling in the details to executive agencies.¹³⁷ The Supreme Court confirmed in *Chevron U.S.A. v. Natural Resources Defense Council*,¹³⁸ that when Congress leaves a gap in a statute, executive agencies have the power to formulate policy and make rules to fill that gap.¹³⁹ If Congress is explicit in directing an agency to fill a statutory gap, there is an express delegation of authority to the agency to explicate a provision of the statute by regulation.¹⁴⁰ Upon judicial review, such “quasi-legislative” regulations are controlling, unless they are arbitrary, capricious or manifestly contrary to the statute.¹⁴¹ If Congress is silent or ambiguous concerning a statutory gap, legislative delegation is implicit. In such cases, courts must defer to the agencies’ reasonable interpretation of the statute.¹⁴²

In *Chrysler Corp. v. Brown*,¹⁴³ the Court clarified that properly promulgated, substantive agency regulations may have “the force and effect of law.”¹⁴⁴ In order for a regulation to have the “force and effect of law,” the Court explained, it must meet three criteria.¹⁴⁵ First, the regulation must be a “substantive rule” rather than an “interpretive rule[], general statement[] of policy, or rule[] of

134. *Id.* at 526 (Rehnquist, J., dissenting).

135. *Id.* at 526 (Rehnquist, J., dissenting) (internal quotations and citations omitted).

136. *Id.* at 527 (Rehnquist, J., dissenting).

137. Mank, *supra* note 10, at 1459; Davant, *supra* note 10, at 642.

138. 467 U.S. 837 (1984).

139. *Id.* at 843-44; see *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

140. *Chevron U.S.A.*, 467 U.S. at 843-44.

141. *Id.* at 844.

142. *Id.*

143. 441 U.S. 281 (1979).

144. *Id.* at 295.

145. *Id.* at 301-03.

agency organization, procedure, or practice.”¹⁴⁶ A substantive rule is a “legislative-type rule” that affects “individual rights and obligations.”¹⁴⁷ Second, the agency’s “quasi-legislative” authority must be “rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”¹⁴⁸ Third, the promulgation of such regulations must “conform with any procedural requirements imposed by Congress.”¹⁴⁹

Together, *Chevron* and *Chrysler* stand for the proposition that federal agencies, even absent explicit statutory language, may promulgate substantive regulations which have the force and effect of law. While the Constitution allocates power to create individual federal rights solely to Congress, the *Chevron* and *Chrysler* doctrines provide at least presumptive evidence that executive agencies can fill statutory gaps by defining individual statutory “rights,”¹⁵⁰ which have “the force and effect of law,” and are therefore enforceable under § 1983.¹⁵¹ While not offering an explicit answer, the Supreme Court has skirted the issue several times, resulting in a circuit split.

A. *Guardians Ass’n v. Civil Services Commission of New York*

Since *Thiboutot*, many lawyers, judges, and scholars believed that private individuals could enforce federal regulations through § 1983.¹⁵² The Supreme Court first suggested the possibility of enforcing rights secured by federal regulations in *Guardians Ass’n v. Civil Services Commission of New York*.¹⁵³ In *Guardians*, Justice Stevens, joined by Justices Brennan and Blackmun, offered a dissenting opinion stating: “[I]t is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law.”¹⁵⁴ Justice Stevens reasoned that *Maine v. Thiboutot*, whose holding was limited only to federal statutes, should apply equally to administrative regulations having the force of law.¹⁵⁵

B. *Wright v. City of Roanoke Redevelopment & Housing Authority*

In *Wright v. City of Roanoke Redevelopment & Housing Authority*,¹⁵⁶ the Court held that certain Housing and Urban Development (HUD) regulations

146. *Id.* at 301 (citing 5 U.S.C. § 553(b),(d)).

147. *Id.* at 302 (citing *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)).

148. *Id.*

149. *Id.* at 303 (citing *Morton*, 415 U.S. at 232).

150. That is, agency regulations which use rights-creating language and thereby meet the *Blessing* rights test.

151. See, e.g., *Mank*, *supra* note 10, at 1461; *Davant*, *supra* note 10, at 642.

152. *Davant*, *supra* note 10, at 648.

153. 463 U.S. 582 (1983); *Pettys*, *supra* note 34, at 71-72.

154. *Guardians*, 463 U.S. at 638.

155. *Id.* at 637 n.6.

156. 479 U.S. 418 (1987).

created enforceable rights under § 1983.¹⁵⁷ Under the United States Housing Act of 1937, public housing authorities (PHA's) throughout the country established housing for low-income people.¹⁵⁸ In 1969, the Brooke Amendment imposed a rent ceiling, providing that a low-income family "shall pay as rent" a specified percentage of their income.¹⁵⁹ HUD regulations defined "contract rent"—the amount actually charged to low-income tenants—as including a reasonable amount for the use of utilities.¹⁶⁰ In *Wright*, the plaintiffs, tenants in a municipal low-income housing project, alleged that the PHA failed to comply with the applicable HUD regulations in establishing the amount of utility service to which they were entitled.¹⁶¹ The plaintiffs argued that the PHA imposed a surcharge for "excess" utility consumption that should have been included in their rent calculation, depriving them of their statutory right to pay only the prescribed maximum portion of their income as rent.¹⁶² The Court held in a five-to-four decision that "[t]he [HUD] regulations . . . defining the statutory concept of 'rent' as including utilities, have the force of law, *Chrysler Corp. v. Brown* . . . [and] the benefits Congress intended to confer on tenants are . . . enforceable rights under . . . § 1983."¹⁶³

In dissent, Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Powell and Scalia, concluded that the majority had stopped short of holding the HUD "regulations *alone* could create such a right" without explicit language in the statute, legislative history, or administrative interpretation of the Brooke Amendment that Congress intended to create an enforceable right to utilities.¹⁶⁴ While the majority thought it "clear that the regulations gave low-income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute,"¹⁶⁵ the dissent raised questions as to whether the majority tied this right to the statute or the regulation.¹⁶⁶ While Justice O'Connor did not resolve the issue, concluding that even if the regulations could create rights enforceable in a § 1983 action the regulations at issue were not capable of judicial enforcement, she expressed strong doubts:

I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.

157. *Id.* at 431-32.

158. *Id.* at 419-20 (citing 42 U.S.C. § 1401).

159. *Id.* at 420 (citing 42 U.S.C. § 1437a).

160. *Id.* (citing 24 C.F.R. § 860.403).

161. *Id.* at 421.

162. *Id.* at 421-22.

163. *Id.* at 431-32.

164. *Id.* at 437 (O'Connor, J., dissenting) (emphasis in original).

165. *Id.* at 420 n.3.

166. Mank, *supra* note 10, at 1463; Pettys, *supra* note 34, at 75-76.

Thus, HUD's frequently changing views on how best to administer the provision of utilities to public housing tenants becomes the focal point for the creation and extinguishment of federal "rights." Such a result, where determination of § 1983 "rights" has been unleashed from any connection to congressional intent, is troubling indeed.¹⁶⁷

Following *Wright*, circuit courts split on whether regulations could create "rights" enforceable under § 1983.

C. The Circuit Split

1. *Agency Regulations Cannot Create Federal "Rights" Enforceable Through § 1983.*—In *Smith v. Kirk*,¹⁶⁸ the Fourth Circuit held that an administrative regulation promulgated pursuant to the Social Security Act could not create rights privately enforceable under § 1983.¹⁶⁹ In *Kirk*, the Director of the North Carolina Division of Vocational Rehabilitation Services applied an economic needs test in denying the plaintiffs' applications for certain equipment needed to accommodate physical disabilities. The plaintiffs brought a § 1983 suit, alleging that the State's use of the economic needs test violated Social Security Administration regulations promulgated pursuant to the Social Security Act.¹⁷⁰ Despite mandatory language in the regulation, the court concluded that the regulations could not create enforceable rights "not already implicit in the enforcing statute."¹⁷¹ "The Supreme Court has never held that [a regulation] could [create an enforceable right]," the court stated, "to the contrary, members of the Court have expressed doubt that administrative regulations *alone* could create such a right."¹⁷²

The Eleventh Circuit confronted a similar issue in *Harris v. James*:¹⁷³ whether federal regulations requiring state Medicaid plans to ensure recipients necessary non-emergency transportation to and from providers gave recipients an enforceable right to enforce such transportation under § 1983.¹⁷⁴ The court ultimately held that regulations could not create privately enforceable federal

167. *Wright*, 479 U.S. at 438.

168. 821 F.2d 980 (4th Cir. 1987).

169. *Id.* at 984.

170. *Id.* at 982.

171. *Id.* at 984; *see also* *Former Special Project Employees Ass'n v. City of Norfolk*, 909 F.2d 89 (4th Cir. 1990) (holding that the Model Cities Act and directives and regulations issued by HUD did not create enforceable rights under § 1983); *Ritter v. Cecil County Office of Hous. & Cmty. Dev.*, 33 F.3d 323, 327 n.3 (4th Cir. 1994) ("Rights created by regulation alone, if rights can be so created, probably cannot form the basis for a § 1983 action.").

172. *Kirk*, 821 F.2d at 984 (citing *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 438 (1987) (O'Connor, J., dissenting) (emphasis in original)).

173. 127 F.3d 993 (11th Cir. 1997).

174. *Id.* at 995-96. The transportation requirement did not appear in the statute, only in the regulation.

rights.¹⁷⁵ The court reasoned that the majority in *Wright* did not hold that federal rights can be created by regulations “alone,” or by any valid administrative interpretation of a statute which appears to have created enforceable rights. Rather, the court reasoned that the *Wright* majority located the enforceable right in the statutory provision, relying on the regulation only to define the content of a right that Congress had conferred.¹⁷⁶ Thus, the court interpreted *Wright* to require that the statutory provision itself confer a specific right under the *Blessing* rights test, and that valid regulations may “merely further define[] or flesh[] out the content of that right.”¹⁷⁷

The court further emphasized the Supreme Court’s growing focus on the requirement that Congress intend to create a particular federal right.¹⁷⁸ A regulation, which defines the content of a statutory provision that itself does not meet the *Blessing* rights test, or a regulation which goes beyond the mere interpretation of the specific content of a statutory provision and imposes distinct obligations to further the broad objectives which underlie the statute, “is too far removed from Congressional intent to constitute a ‘federal right’ enforceable under § 1983.”¹⁷⁹

The Third Circuit concurred with the Fourth and Eleventh Circuits, holding in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*¹⁸⁰ that Environmental Protection Agency disparate impact regulations promulgated pursuant to Title VI did not alone create enforceable rights under § 1983.¹⁸¹ The court read *Wright* narrowly: “Clearly . . . the regulation at issue in *Wright* merely defined the specific right that Congress already had conferred through the statute. There should be no doubt on this point.”¹⁸² Like the Eleventh Circuit, therefore, the *South Camden* court concluded that a regulation promulgated pursuant to a statute that does not itself confer a federal right, or a regulation that portends to create an entitlement through extra-statutory interpretation, cannot create enforceable federal rights remedied through § 1983.¹⁸³ However, despite the Third and Eleventh Circuits’ vigorous attempts to construe *Wright* as unambiguous, other circuits have reached opposite conclusions as to *Wright*’s legal significance.

2. *Agency Regulations Can Create Federal “Rights” Enforceable Through § 1983.*—In *Samuels v. District of Columbia*,¹⁸⁴ the D.C. Circuit held that where

175. *Id.* at 1009-10.

176. *Id.* at 1007-08.

177. *Id.* at 1008-09.

178. *Id.* at 1008 (noting that the “driving force behind the Supreme Court’s case law . . . is a requirement that courts find a Congressional intent to create a particular federal right”).

179. *Id.* at 1009.

180. 274 F.3d 771 (3d Cir. 2001).

181. *Id.* at 790.

182. *Id.* at 783 (internal citations omitted).

183. *Id.* at 790.

184. 770 F.2d 184 (D.C. Cir. 1985).

federal regulations have the "force and effect of federal law" under *Chrysler*,¹⁸⁵ they are enforceable in a § 1983 action.¹⁸⁶ The plaintiffs in *Samuels* were a class of public housing tenants in Washington D.C. who alleged that the District had failed to implement and maintain an administrative grievance procedure for complaints concerning the operation and maintenance of public housing projects in violation of the United States Housing Act and its accompanying HUD regulations.¹⁸⁷ The Act provided that HUD "shall by regulation require each public housing agency receiving assistance [under the Act] to establish and maintain an administrative grievance procedure" to remedy tenant-management disputes.¹⁸⁸ Pursuant thereto, HUD enacted regulations providing the availability of administrative grievance procedures for tenants disputing "any PHA action or failure to act involving the tenant's lease with the PHA or PHA regulations which adversely affect the tenant's rights, duties, welfare or status."¹⁸⁹

The defendant, the District of Columbia, argued that the Act indicated a congressional intent only to provide a grievance procedure when a PHA actively purposed to take some affirmative future action (e.g., raising rent or terminating a tenancy), but not, as here, where a PHA failed to act.¹⁹⁰ In rejecting the defendant's act/omission distinction, the D.C. Circuit concluded that the HUD regulations implementing the grievance procedure provision required a procedure "for any adverse PHA 'action or failure to act' involving a tenant's lease or the PHA's regulations."¹⁹¹ The plaintiffs' complaint, therefore, was not rooted in the language of the Act, but in the applicable HUD regulations. "[T]hat allegation alone," the D.C. Circuit concluded, "states a cognizable section 1983 claim."¹⁹² The court reasoned that the Supreme Court's broad analysis in *Thiboutot* of the "laws" clause of § 1983 indicated that the § 1983 remedy was available for all valid federal laws,

including at least those federal regulations adopted pursuant to a clear congressional mandate that have the full force and effect of law. Such regulations have long been recognized as part of the body of federal law, and *Thiboutot* expressly held that Congress did not intend to limit section 1983 to some subset of federal laws.¹⁹³

The D.C. Circuit's approach suggests that a regulation having the force of law is a sufficient predicate for its enforcement under § 1983. As *Pennhurst* and *Blessing* suggest, however, the § 1983 remedy is available only for the

185. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979).

186. *Samuels*, 770 F.2d at 199.

187. *Id.* at 191.

188. *Id.* at 189 (quoting 42 U.S.C. § 1437d(k)).

189. *Id.* (quoting 24 C.F.R. § 966.50 (1984)).

190. *Id.* at 199.

191. *Id.* (emphasis in original) (quoting 24 C.F.R. §§ 966.51(a), 966.53(a) (1984)).

192. *Id.*

193. *Id.* (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)).

deprivation of "rights . . . secured . . . [by] laws."¹⁹⁴ Thus, despite a regulation having the force of law, if it does not secure some federal right it remains unenforceable under § 1983.

The Sixth Circuit, in *Loschiavo v. City of Dearborn* and its kin,¹⁹⁵ recognized the necessity of establishing the existence of a federal right secured by a federal law.¹⁹⁶ In *Loschiavo*, the plaintiffs had installed a receive-only satellite dish antenna in the backyard of their single-family home. Three days later, the plaintiffs received a "Notice of Violation" for failing to comply with a local zoning ordinance which required both approval and a permit from local authorities prior to the installation of an antenna exceeding a certain size.¹⁹⁷ After their application for a variance was denied, the plaintiffs filed a § 1983 suit, seeking to enforce rights conferred by certain Federal Communications Commission regulations which, it was alleged, preempted the local zoning ordinance by prohibiting the enforcement of ordinances that unduly interfered with the installation of satellite antennas.¹⁹⁸ The court casually concluded: "As federal regulations have the force of law, they likewise may create enforceable rights."¹⁹⁹ The court then employed the *Blessing* rights test, holding that the plaintiffs were the intended beneficiaries of the regulation at issue, the language of the regulation spoke in terms of a mandate, and the regulation was within the competence of the judiciary to enforce.²⁰⁰ Thus, the court held, the regulations created enforceable rights under § 1983.

III. CONTEMPORARY SUPREME COURT JURISPRUDENCE: APPLYING IMPLIED RIGHT OF ACTION ANALYSIS TO § 1983

In recent years, the Supreme Court has developed a growing hostility toward the administrative state, the burgeoning federal government, and civil rights generally.²⁰¹ This antagonism toward the creation and enforcement of federal

194. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981) (noting that the § 1983 remedy is available for the violation of rights, not merely laws); 42 U.S.C. § 1983 (2000) (emphasis added).

195. 33 F.3d 548 (6th Cir. 1994); *Wood v. Tompkins*, 33 F.3d 600 (6th Cir. 1994) (applying the *Blessing* rights test to certain Medicaid regulations, and concluding that the regulations created enforceable rights under § 1983); *Levin v. Childers*, 101 F.3d 44 (6th Cir. 1996) (noting that the *Blessing* rights test is used to determine whether a federal regulation created enforceable rights under § 1983).

196. *Loschiavo*, 33 F.3d at 551.

197. *Id.* at 550.

198. *Id.*

199. *Id.* at 551 (citing *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431 (1987)).

200. *Id.* at 552-53.

201. *Davant*, *supra* note 10, at 627-28 (noting that the Court has "invalidated administrative regulations as 'unreasonable,' invalidated federal statutes as invading state sovereignty, and made it more difficult to enforce § 1983 against state officers").

rights has surfaced in two recent decisions which, in effect, have endorsed the more stringent implied right of action analysis in § 1983 suits.²⁰²

In *Alexander v. Sandoval*,²⁰³ the Court considered whether Department of Justice ("DOJ") disparate-impact regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964 created an implied private right of action.²⁰⁴ Section 601 of Title VI provides that no person shall purposefully "be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity," on the basis of "race, color, or national origin."²⁰⁵ Section 602 of Title VI authorized federal agencies to "effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability."²⁰⁶ In an exercise of their authority under § 602, the DOJ promulgated regulations prohibiting recipients of federal funds from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."²⁰⁷ The Alabama Department of Public Safety subjected itself to this regulation when it accepted financial assistance from the DOJ.

The Alabama Department of Public Safety, in accordance with a State mandate declaring English the official language of Alabama, decided to administer state driver's license examinations only in English.²⁰⁸ The plaintiff class brought suit, alleging that the DOJ regulation created an implied right of action and the English-only policy violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination on the basis of national origin.²⁰⁹

Justice Scalia, writing for Chief Justice Rehnquist, and Justices Thomas, O'Connor, and Kennedy, began his analysis with three straightforward propositions: (1) § 601 of Title VI creates an implied right of action, and therefore may be privately enforced;²¹⁰ (2) § 601 of Title VI prohibits only intentional discrimination;²¹¹ and (3) for purposes of deciding this case, it is assumed that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."²¹² Following these propositions, the

202. See *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

203. 532 U.S. 275.

204. *Id.* at 278.

205. *Id.* (citing 42 U.S.C. § 2000d).

206. *Id.* (citing 42 U.S.C. § 2000d-1).

207. *Id.* (citing 28 C.F.R. § 42.104(b)(2) (2000)).

208. *Id.* at 278-79.

209. *Id.* at 279.

210. *Id.* at 279-80 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979)).

211. *Id.* at 280 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

212. *Id.* at 281 (noting that Alabama did not challenge the regulations, thus it was assumed that they were valid); see *id.* at 305 (Stevens, J., concurring) (stating "regulations promulgated pursuant to § 602 may 'go beyond . . . § 601' as long as they are 'reasonably related' to its antidiscrimination

Court concluded that a regulation applying § 601's prohibition on *intentional* discrimination could be enforced under the recognized implied cause of action available to enforce § 601 itself.²¹³ The Court reasoned that regulations banning intentional discrimination would, "if valid and reasonable, authoritatively construe the statute itself."²¹⁴ It would be meaningless to speak of a separate cause of action to enforce the regulations apart from the statute: "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well."²¹⁵

In *Sandoval*, however, the plaintiffs sought to enforce DOJ regulations which prohibited activities having a discriminatory impact, rather than activities which were intentionally discriminatory.²¹⁶ "It is clear," the Court stated, "that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations."²¹⁷ Thus, the Court was confronted with the narrow issue of whether the disparate-impact regulation by itself created an implied right of action.

The Court held that the DOJ regulation did not create an implied right of action, reasoning that private rights of action must be created by Congress.²¹⁸ "The judicial task," Scalia wrote, "is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."²¹⁹ This is grounded in separation of powers concerns: "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."²²⁰ In other words, Congress has the exclusive authority to set the limits of federal jurisdiction, and only Congress has the authority to interfere with the lawmaking powers of the states.²²¹ Thus, *Sandoval* emphasizes that an implied right of action to enforce agency regulations must be derived from the statute itself, not from the regulation alone.²²² The Court stated:

Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that

mandate"); see also *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 637 (1983) (Stevens, J., dissenting).

213. *Sandoval*, 532 U.S. at 284.

214. *Id.*

215. *Id.*

216. *Id.* at 285.

217. *Id.* at 285-86 (citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994)).

218. *Id.* at 286.

219. *Id.*

220. *Id.* at 287 (quoting *Lampf, Pleva, Lipkino, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)).

221. Key, *supra* note 24, at 299.

222. *Sandoval*, 532 U.S. at 286-89.

Congress has not. . . . Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.²²³

Here, the only statutory support for the promulgation of the DOJ disparate-impact regulation was § 602 of Title VI. The only congressional intent sounding in § 602 was that necessary to authorize federal agencies to effectuate the provisions of § 601: "Each federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601]."²²⁴ Thus, the Court read § 602 independent of § 601, and concluded that § 602 is purely focused on authorizing the promulgation of regulations, not on the creation of new rights of action.²²⁵

One year after *Sandoval*, the Court held in *Gonzaga University v. Doe*,²²⁶ that the Family Educational Rights and Privacy Act (FERPA) did not create individual rights enforceable under § 1983.²²⁷ Congress enacted FERPA under its spending power, conditioning the receipt of federal funds to educational institutions on the satisfaction of certain requirements relating to the access and disclosure of student educational records.²²⁸ Under the Act, funds were to be withheld if an educational institution had a "policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization."²²⁹

In *Gonzaga*, the plaintiff was denied certification as a Washington schoolteacher when his undergraduate university contacted the state agency responsible for teacher certification, identified the plaintiff by name, and discussed his involvement in an investigation into allegations of sexual misconduct.²³⁰ The plaintiff brought suit for damages, alleging that FERPA conferred a federal right, enforceable under § 1983, to prevent "education records" from being disclosed to unauthorized persons without their express written consent.²³¹ The Court rejected the plaintiff's argument, holding,

[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an

223. *Id.* at 291.

224. *Id.* (quoting 42 U.S.C. § 2000d-1).

225. *Id.* at 288-89.

226. 536 U.S. 273 (2002).

227. *Id.* at 276.

228. *Id.* at 278.

229. *Id.* (quoting 20 U.S.C. § 1232g(b)(1)).

230. *Id.* at 277.

231. *Id.* at 280.

implied private right of action. FERPA's nondisclosure provisions contain no rights-creating language . . . They therefore create no rights enforceable under § 1983.²³²

The Court's reasoning, as its holding suggests, places singular focus on Congress's unambiguous intent to create enforceable statutory rights. The Court recognized that under the *Blessing* rights test,²³³ the inquiry into congressional intent was limited to whether Congress intended the statutory provision in question to "benefit" the plaintiff.²³⁴ This led some courts to "discover" federal statutory rights enforceable under § 1983 when the plaintiff merely fell within the "general zone of interest that the statute [was] intended to protect."²³⁵ The Court found this curious, noting that in such cases the rights-creating language faced a less exacting standard than that which had been required for a statute to create rights enforceable directly from the statute itself under an implied private right of action.²³⁶ In an implied right of action context, the Court prompted, before the plaintiff show that the statute manifests an intent to create a private remedy, the plaintiff must first show that the statute's text manifests an intent, "phrased in terms of the persons benefited," to create a private right.²³⁷ The Court rejected the apparent dual standard of rights creation, offering two critical conclusions: first, "[w]e now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983";²³⁸ second, "we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases."²³⁹

Together, these conclusions stand for the proposition that in *both* a § 1983 and an implied right of action context a plaintiff who seeks to enforce statutory rights must first show that Congress, through unambiguous statutory terms, intended to create a federal right phrased in terms of the persons benefited. Thus, by merging the implied right of action standard with rights creation generally, the Court strengthened the first prong of the *Blessing* rights test,²⁴⁰ and now requires that the initial inquiry into whether federal statutory rights are enforceable under § 1983 *or* an implied right of action is identical: "[I]n either case [courts] must first determine whether Congress *intended to create a federal right*."²⁴¹ By

232. *Id.* at 290.

233. *See infra* note 240.

234. *Gonzaga*, 536 U.S. at 282.

235. *Id.* at 283.

236. *Id.*

237. *Id.* at 284 (citing *Touche Ross v. Redington*, 442 U.S. 560, 576 (1979)).

238. *Id.* at 283.

239. *Id.*

240. *Blessing* merely requires that the statutory provision "benefit the plaintiff." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). *Gonzaga* strengthens this prong, requiring the statutory provision to be "phrased in terms of the persons benefited." *Gonzaga*, 536 U.S. at 274, 284 (emphasis added).

241. *Gonzaga*, 536 U.S. at 283 (emphasis in original).

apparently extending *Sandoval*'s holding²⁴² (only Congress can create implied rights of action) to the creation of federal statutory rights enforceable under § 1983, and concluding that only unambiguous congressional intent may create individual statutory rights, it appears that the Court has placed thousands of rights-creating regulations on the brink of irrelevancy.

IV. THE NINTH CIRCUIT AND THE ENFORCEMENT OF ADMINISTRATIVE REGULATIONS UNDER § 1983

Save Our Valley v. Sound Transit (SOV) is the first case to consider whether federal regulations can, by themselves, create rights enforceable under § 1983 since *Sandoval* and *Gonzaga*.²⁴³ In *SOV*, the plaintiff alleged that Sound Transit's plan to build a light-rail line at street-level through Rainier Valley would violate a Department of Transportation regulation which prohibited recipients of federal funds from taking actions having the effect of discriminating on the basis of race.²⁴⁴ Although the regulation proscribed activity (actions having a disparate impact on race) that was permitted under the enabling legislation (Title VI only prohibited intentional discrimination), the plaintiffs contended that the regulation created an individual federal right enforceable under § 1983.²⁴⁵ The court disagreed: "[B]ecause of controlling Supreme Court precedent [in *Sandoval* and *Gonzaga*], we hold that an agency regulation cannot create individual rights enforceable through § 1983."²⁴⁶

After surveying the circuit split, the majority turned to Supreme Court precedent.²⁴⁷ The court focused on *Sandoval*, emphasizing its holding that the implementing regulations of § 602 of Title VI do not create a private right of action.²⁴⁸ The *Sandoval* Court's analysis turned "not on the *regulation's* text but on the *statute's* text,"²⁴⁹ and thus the Ninth Circuit concluded that the Supreme Court intended that "only *Congress by statute* can create a private right of action."²⁵⁰ While recognizing that *Sandoval* addressed only one kind of federal right—implied rights of action—the *SOV* court suggested that *Sandoval's*

242. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (holding that only Congress can create implied rights of action).

243. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 935-36 (9th Cir. 2003).

244. *Id.* at 935. The disparate-impact regulation was promulgated pursuant to § 602 of Title VI, in which "Congress authorized federal agencies to 'effectuate the provisions of [§ 601], . . . by issuing rules, regulations, or orders of general applicability.'" *Id.* (citing 42 U.S.C. § 2000d-1). Pursuant to § 602, DOT promulgated a regulation prohibiting "recipients" of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin." *Id.* (citing 49 C.F.R. § 21.5(b)(2)).

245. *Id.*

246. *Id.* at 935-36.

247. *Id.* at 936-37.

248. *Id.* at 937.

249. *Id.* (emphasis in original).

250. *Id.* (emphasis in original).

reasoning had broader implications.²⁵¹ The conclusion that only Congress by statute could create private rights of action, the *SOV* majority argued, encompassed the “creat[ion] of individual rights of *any* kind (including, we conclude, rights enforceable through § 1983).”²⁵² Although the *Sandoval* Court never performed a *Blessing* rights-creating analysis on the regulations themselves,²⁵³ the Ninth Circuit majority interpreted the Supreme Court’s singular focus on Congressional intent in the creation of private rights of action as dispositive in the context of rights-creation generally. The court concluded, “[i]ndividual rights enforceable through § 1983—like implied rights of action—are creatures of substantive federal law; therefore, they must be created by Congress.”²⁵⁴

The *SOV* court then turned to *Gonzaga*, arguing that the Supreme Court laid to rest any previously conceived distinction between the creation of implied rights of action and individual rights enforceable under § 1983.²⁵⁵ While an inquiry into whether § 1983 provides a cause of action for violation of federal statutes is a different inquiry than determining whether a private right of action can be implied from a particular statute, the *Gonzaga* Court recognized a crucial similarity: in either case courts are first required to determine “whether Congress intended to create a federal right.”²⁵⁶ Thus, the Ninth Circuit synthesized *Sandoval*’s holding that only Congress can create implied rights of action with *Gonzaga*’s conclusion that § 1983 and implied rights of action remedies are both predicated on the creation of enforceable federal rights, to conclude that only Congress, and not agencies through regulation, can create rights enforceable through § 1983.²⁵⁷

In her partial dissent, Judge Berzon attacked the majority’s “utter[] confus[ion]” regarding the Supreme Court’s blurred distinction between rights and rights of action,²⁵⁸ and advocated for the proposition that because binding regulations have the form, function, and force of law, § 1983’s “laws” language includes rights secured by regulations under a *Blessing* analysis.²⁵⁹ These propositions are integral to the preservation of an enforcement scheme which will allow the intended beneficiaries of federal programs to enforce the conditions placed upon state agencies and institutions for the receipt of federal funds.²⁶⁰

Judge Berzon, like Justice Brennan in *Wilder*, made clear the distinction

251. *Id.*

252. *Id.* (emphasis in original).

253. Such an analysis was unnecessary because the Court concluded that only Congress by statute could create a private right of action. Because Congress did not create such a right of action under § 602, it was inapposite whether the regulation created an enforceable right.

254. *Id.* at 938.

255. *Id.*

256. *Id.* at 938 (emphasis omitted).

257. *Id.* at 939.

258. *Id.* at 946 (Berzon, J., dissenting in part).

259. *Id.* at 945 (Berzon, J., dissenting in part).

260. See, e.g., Mank, *supra* note 10, at 1480.

between the creation and existence of rights, and their subsequent enforceability.²⁶¹ “A legal right,” Judge Berzon wrote, “is an entitlement that inheres in an individual and enables her to make certain demands of other individuals, which demands are backed by the coercive power of the state.”²⁶² This tripartite relationship between two individuals and the state is *not* the same as the process by which the right may be enforced in court.²⁶³ “To the contrary,” Judge Berzon instructed, “a cause of action is a specific type of remedy, a procedural vehicle for redressing a violation of a right. Some rights may not be enforceable through such an affirmative remedy in court, and others may not be enforceable in court at all.”²⁶⁴

For example, the Fourth Amendment provides “[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated.”²⁶⁵ The language of the amendment, “the right . . . shall not be violated,” suggests that the right to be secure in one’s home was possessed prior to the existence of the national government.²⁶⁶ Moreover, after the Republic was founded, this right continued to have significance apart from any private remedial scheme to redress its violation.²⁶⁷ Congress is required to respect it when legislating, and Executive officials must adhere to it when enforcing the law.²⁶⁸ This demonstrates that “a person can possess a meaningful right, and that right can have real-life consequences for the conduct of other persons, independent of a concomitant ability to sue for violation of that right.”²⁶⁹

261. *Save Our Valley*, 335 F.3d at 946 (Berzon, J., dissenting in part); see *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 499 (1990) (noting the distinction between rights and remedies: whether § 1983 provides a cause of action for violation of a federal statute is a “different inquiry” than “determining whether a private right of action can be implied from a particular statute”).

262. *Save Our Valley*, 335 F.3d at 947.

263. This tripartite relationship may include variations where one of the “individuals” is another level of government, or where the “state” is embodied in the Constitution or other binding document which regulates government officials in their relationships with individuals. *Id.* at 947 n.1 (Berzon, J., dissenting in part).

264. *Id.*

265. U.S. CONST. amend. IV.

266. See *Save Our Valley*, 335 F.3d at 948.

267. *Id.* In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court permitted a direct private right of action against government officials to redress violations of constitutional rights. However, as Judge Berzon noted, “[i]t would be absurd to say that, until *Bivens*, individuals did not possess with respect to the federal government, or possess in any meaningful sense, the Fourth Amendment right to be free of unreasonable searches and seizures.” *Save Our Valley*, 335 F.3d at 950 (Berzon, J., dissenting in part).

268. *Save Our Valley*, 335 F.3d at 950 (Berzon, J., dissenting in part).

269. *Id.* at 951. Another example is contained in the Declaration of Independence. That document declared that some rights, like the right to life, liberty, and property, derive from a source independent of the state, and that it is the government’s role to secure these rights. Providing civil remedies is one way that such rights may be enforced. However, as the Declaration of

This distinction is crucial when considering the relationship between implied rights of action and the enforcement of federal rights under § 1983. When considering the former, courts are guided by *Cort v. Ash* which requires, first a determination of whether the statute in question creates a federal right, and second, whether Congress intended to provide for its private enforcement.²⁷⁰ This creates an essential dichotomy between right and remedy. If either part fails, a private right of action does not exist.²⁷¹

Section 1983, as Justice Brennan clarified in *Wilder*, by itself creates a right of action.²⁷² In fact, its *only* function is to supply a cause of action for the enforcement of those individual rights, “secured by the Constitution and laws,”²⁷³ for which Congress has not otherwise prescribed a private remedy.²⁷⁴ Thus, the availability of the § 1983 remedy where the rights-creating statute does not also create a private right of action “is premised on, and only makes sense in light of, the idea that rights and remedies are distinct.”²⁷⁵ While the first question in both an implied right of action and § 1983 context is whether a right exists,²⁷⁶ the second question, whether the statute creates a mechanism for private redress, is answered in the nature of § 1983 itself. The majority in *SOV* failed to make the crucial distinction between rights and remedies when it argued that *Sandoval*’s reasoning “applies equally” to both questions.²⁷⁷

Sandoval’s holding related solely to the second inquiry: a regulation may not create a private right of action when the statute it implements demonstrates no congressional intent to do so.²⁷⁸ This singular focus was driven by the separation of powers concern that because Congress is the sole provider of access to federal courts, only congressional intent is relevant in determining whether to imply a cause of action.²⁷⁹ The *SOV* majority committed a fatal flaw when it extended *Sandoval*’s holding and separation of powers reasoning to rights creation. When Congress expressly authorized access to federal courts under § 1983 it removed the separation of powers concerns, leaving intact the question of whether a right exists.²⁸⁰ While “rights” and “rights of action” may both be “creatures of

Independence makes clear, these rights may be “enforceable” in the absence of civil remedies: they may be enforced by insurrection. *Id.* at 947-48.

270. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The first factor of the *Cort* test is whether the statute creates a federal right the final three factors relate to a determination of whether Congress intended for the right to be privately enforced. *See id.*

271. *See Save Our Valley*, 335 F.3d at 952 (Berzon, J., dissenting in part).

272. *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 509 n.9 (1990).

273. 42 U.S.C. § 1983 (2000).

274. *See Save Our Valley*, 355 F.3d at 952 (Berzon, J., dissenting in part).

275. *Id.*

276. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

277. *See Save Our Valley*, 355 F.3d at 937.

278. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

279. *Id.* at 287; *see Key*, *supra* note 24, at 299.

280. *See Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 509 n.9 (1990).

substantive federal law,"²⁸¹ they are different breeds of law, existing apart from one another, and which require distinct analyses. Thus, after *Sandoval*, uncertainties remained about whether a regulation "is the type of legal prescript that Congress meant to be enforceable under § 1983."²⁸²

The *SOV* majority erroneously relied on *Gonzaga* to ease doubts "as to the genesis of individual rights enforceable through § 1983 after *Sandoval*."²⁸³ While *Gonzaga* stands for the proposition that § 1983 rights and private rights of action both require a showing that the law at issue creates an individual right, that is *all* it does: "[T]he inquiries overlap in *one* meaningful respect"—whether a federal right exists.²⁸⁴ It did *not* merge the unique private right of action inquiry—whether Congress intended to create a private right of action—with rights creation.²⁸⁵ Thus, *Gonzaga* did *not* conclude that only Congress can create rights enforceable through § 1983.²⁸⁶ Rather, the *Gonzaga* Court's emphasis on congressional intent arose from the plaintiff's unique legal posture in which it was argued that the statute itself secured the right he sought to enforce under § 1983.²⁸⁷ *Gonzaga* did not address whether a particular type of law—a federal regulation—*can* create a right.²⁸⁸ This analysis requires consideration of contemporary administrative law principles.

Section 1983 contemplates the private enforcement of "rights" secured by the "Constitution and laws."²⁸⁹ Thus, whether a federal regulation can create rights enforceable under § 1983 requires a two-step inquiry: first, whether regulations can create "rights," and second, whether regulations are "laws" that may secure rights. Fundamental administrative law principles embodied in the *Chevron* and *Chrysler* doctrines suggest that agency regulations may secure rights independent of specific congressional intent, and that such rights may be vindicated under § 1983.

The majority in *SOV*, and at least one recent commentator, contend that because "Congress, rather than the executive, is the lawmaker in our democracy," only Congress can create rights enforceable under § 1983.²⁹⁰ This truism fails to "capture the nuances of our contemporary understanding of the relationship between Congress and the administrative agencies."²⁹¹ *Chevron* provides that Congress need not legislate with particularity, but may delegate to agencies the

281. *Save Our Valley*, 335 F.3d at 937.

282. *Id.* at 953 (Berzon, J., dissenting in part).

283. *Id.* at 938.

284. *Gonzaga*, 536 U.S. at 283 (emphasis added).

285. *See Sandoval*, 532 U.S. at 286-87.

286. *See Save Our Valley*, 335 F.3d at 954 (Berzon, J., dissenting in part).

287. *Id.*

288. *See id.* at 954.

289. 42 U.S.C. § 1983 (2000).

290. *Save Our Valley*, 335 F.3d at 939; *see also* Davant, *supra* note 10, at 635-41 (arguing that "right-making" is a legislative function which separation of powers and federalism principles limit to Congress alone).

291. *Save Our Valley*, 335 F.3d at 957-58 (Berzon, J., dissenting in part).

power to fill legislative gaps.²⁹² Where the delegation is explicit, the meaning effectuated by the agency is controlling unless it is “arbitrary, capricious or manifestly contrary to the statute.”²⁹³ If the grant of authority is implicit, reasonable interpretations made by the administrator of the agency are valid.²⁹⁴ Thus, even absent express congressional intent, an agency’s elucidation of a provision of a statute, “if valid and reasonable, authoritatively construe[s] the statute itself.”²⁹⁵ In this way, the promulgation of reasonable and valid regulations is an extension of the legislative process. When given proper authorization, agencies may create new obligations not expressly intended by Congress as a matter of course.²⁹⁶ Under this conception, Congress may circumscribe an area within which agencies may perform many of the same functions that Congress itself performs. In this way, a regulation’s validity is not limited to fleshing out specific statutory provisions.²⁹⁷ Rather, these principles of administrative law suggest that agencies may promulgate regulations that have the “particular form of rules that we describe as creating ‘rights.’”²⁹⁸

Broadly defined, a federal “right” enforceable under § 1983 arises from a tripartite legal relationship between two persons and the state—an entitlement inhering in an individual which enables him to make demands of others, and “which demands are backed by the coercive power of the state.”²⁹⁹ Since *Blessing*, the Supreme Court requires that such entitlements take the form of an unambiguous benefit conferred through “rights-creating” language.³⁰⁰ Agencies regularly use “rights-creating” language to promulgate substantive rules whose effect is to confer unambiguous benefits to certain classes of persons.³⁰¹ In fact,

292. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

293. *Id.*

294. *Id.* at 844.

295. *Sandoval*, 532 U.S. at 284.

296. *See, e.g., Chevron*, 467 U.S. at 845 (holding that Congress did not specifically intend to create the “bubble rule,” but that the rule represented a reasonable policy choice that Congress left the agency to make).

297. *See Save Our Valley*, 335 F.3d at 959 (Berzon, J., dissenting, in part); *see also* Mank, *supra* note 10, at 1467-69 (arguing that after *Gonzaga* regulations are likely limited to defining the scope of a right which a statute demonstrates that Congress intended to establish); *but see* Harris v. James, 127 F.3d 993, 1008 (1997) (concluding that regulations may merely further define or flesh out the content of a statutory right).

298. *Save Our Valley*, 335 F.3d at 959 (Berzon, J., dissenting in part).

299. *Id.* at 947.

300. *See* Davant, *supra* note 10, at 632; *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). *Gonzaga* further strengthened this prong, requiring that the statute be phrased in terms of the persons benefited. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002).

301. For example, the DOT disparate-impact regulation at issue in *Save Our Valley*, prohibiting recipients of federal funds from using methods of administration which have the effect of discriminating on the basis of race, color, or national origin, is intended to benefit a certain class of persons—racial and ethnic minorities; is not so vague and amorphous that it would strain judicial competence; and, its command on the states is mandatory. *See Save Our Valley*, 335 F.3d at 964

the Supreme Court has stated, “an important touchstone for distinguishing those [agency] rules that may be ‘binding’ or have the ‘force of law’” is that the rule “affect[] individual rights and obligations.”³⁰²

Practical considerations also favor agency rights creation.³⁰³ When Congress seeks to effectuate broad policy objectives, it may not have the expertise or incentive to craft individual rights to achieve its goals.³⁰⁴ Agency administrators are often in a better position to balance competing interests that support and oppose the creation of individual rights.³⁰⁵ Not only do “agency technocrats” oftentimes have greater expertise, they are less prone to “special-interest capture” which may discourage members of Congress from creating individual rights, even when it is in the public interest to do so.³⁰⁶ Unpopularity provides a further disincentive for Congress to create individual rights, even when it is proper.³⁰⁷ Finally, if regulations do not confer individual rights which may be privately enforced, then many regulations will have little, if any, effect.³⁰⁸ Of course, this does not end the inquiry. The mere presence of rights-creating language in a regulation and underlying practical considerations, suggest only that a regulation may create rights, not that a regulation can “secure” those rights.

Section 1983 only permits the enforcement of those rights “secured by the Constitution and laws.”³⁰⁹ Thus, assuming that a regulation may create a “right,” its ultimate enforceability turns on whether the regulation is a “law” within the meaning of § 1983. In *Guardians*, Justices Stevens, Brennan, and Blackmun argued that the plain reading of “laws” in *Thiboutot* encompassed “all valid federal laws, including statutes and regulations having the force of law.”³¹⁰ While this view has never garnered majority support, as a matter of practice regulations have the same form, effect, and are based on similar considerations as statutes, and thus regulations, may properly be considered “laws.”³¹¹

(Berzon, J., dissenting in part). However, as explained *infra*, this regulation likely cannot meet the strengthened first requirement—phrased in terms of the persons benefited.

302. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

303. See Davant, *supra* note 10, at 635. Davant ultimately concludes that these considerations are outweighed by separation of powers concerns—Congress alone has the power to create rights. However, as Judge Berzon contends, this view fails to take into account the nuances of the relationship between Congress and administrative agencies in the contemporary legislative process. *Save Our Valley*, 335 F.3d at 957-58 (Berzon, J., dissenting in part).

304. *Id.*

305. See *Chevron*, 467 U.S. at 865.

306. See Davant, *supra* note 10, at 635.

307. *Id.*

308. *Id.*; Mank, *supra* note 10, at 1480-81.

309. 42 U.S.C. § 1983 (2000).

310. *Guardians Ass’n v. Civil Serv. Comm’n of New York*, 463 U.S. 582 (1983) (Stevens, J., dissenting).

311. See *Save Our Valley*, 335 F.3d at 955 (Berzon, J., dissenting in part). See Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under § 1983? A Theoretical Approach*, 69 BROOK. L. REV. 163, 165 (2003) (arguing that “any reasonable court reading § 1983 would presume that

The promulgation of regulations, like legislation generally, “looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.”³¹² They are, in short, like statutes in that they “are prescriptive, forward-looking, and of general applicability.”³¹³ In addition, agency administrators, like legislators, must weigh “manifestly competing interests.”³¹⁴ In fact, the Supreme Court has recognized that Congress often lacks the technical expertise to accommodate or balance specific competing interests, and thus, “consciously desire[s] the Administrator to strike the balance at this level [of specificity], thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.”³¹⁵ Finally, regulations have the “force of law” when they “affect[] individual rights and obligations.”³¹⁶ Thus, they bind individuals to whom they apply the same way that statutes do.³¹⁷

In addition, the language, structure, and Supreme Court’s command for generous construction of § 1983 stipulates that the “laws” language is not limited to statutes, but embraces regulations as well.³¹⁸ Section 1983 indicates that Congress was keenly aware of the myriad sources of state action that could deprive one of a federal right—“any statute, ordinance, regulation, custom, or usage.”³¹⁹ Elsewhere in that provision, Congress referred to rights secured by the “Constitution and laws.”³²⁰ The *SOV* court noted “when Congress uses different words in a statute, it intends them to have different meanings.”³²¹ Thus, in this context, Congress did not intend for “laws” to be limited to or synonymous with the term “statute.”³²² The Supreme Court declared, “as remedial legislation, § 1983 is to be construed generously to further its primary purpose.”³²³ Thus, consummate with *Thiboutot*’s demand that “laws” is not limited to civil rights and equal protection legislation, but embraces all federal law,³²⁴ this provision should provide for the vindication of rights secured by regulatory law as well.

the word ‘laws’ includes regulations”); *but see* Pettys, *supra* note 34, at 84 (arguing that the “and laws” language of § 1983 was not intended to include regulations: the word “laws” and “regulations having the force of law” are plainly different, and that the latter phrase concedes that regulations are not “laws,” but only have, in certain circumstances, the force of law).

312. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *see also* *Save Our Valley*, 335 F.3d at 954 (Berzon, J., dissenting in part).

313. *Save Our Valley*, 335 F.3d at 954 (Berzon, J., dissenting in part).

314. *Chevron*, 467 U.S. at 865.

315. *Id.*

316. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

317. *Save Our Valley*, 335 F.3d at 955 (Berzon, J., dissenting in part).

318. *See id.*; *see also* *Gomez v. Toledo*, 446 U.S. 635, 639 (1980).

319. 42 U.S.C. § 1983 (2000).

320. *Id.*

321. *Save Our Valley*, 335 F.3d at 960 (Berzon, J., dissenting in part).

322. *Id.*

323. *Gomez*, 446 U.S. at 639.

324. *See* *Guardians*, 463 U.S. at 637 (Stevens, J., dissenting).

In sum, the *SOV* majority misapplied Supreme Court precedent, ignored contemporary administrative law principles, and failed to provide a generous construction of § 1983 to further its remedial purpose when it offered its sweeping holding that agency regulations cannot alone create rights enforceable under § 1983. Notwithstanding this broad holding, however, *Sandoval* and *Gonzaga* do support the majority's narrow conclusion that the DOT disparate-impact regulations at issue did not create enforceable rights.³²⁵

After *Sandoval*, the DOT regulations which implement § 601 and § 602 of Title VI cannot be read together.³²⁶ Thus, the question is whether the disparate impact regulation, on its own, is a valid rights-creating legislative regulation.³²⁷ After *Gonzaga*, the first prong of the *Blessing* rights test has been strengthened, requiring that a right enforceable under § 1983 be unambiguously conferred in terms of the persons benefited.³²⁸ While the DOT regulation at issue in *SOV* satisfies the latter two requirements under *Blessing*—the regulation is not so vague and amorphous as to preclude judicial enforcement and is couched in mandatory terms—the regulation is not phrased in terms of the persons benefited.³²⁹ Rather, the regulation is directed at the “recipient” of federal funds, and precludes that recipient from prescribing criteria having a disparate racial impact.³³⁰ The focus of the regulation, therefore, is on the fund recipient and its method of administering the funded program, not on any individual affected thereby.³³¹ Thus, the regulation fails *Gonzaga*'s heightened “rights-creating language” requirement.

CONCLUSION

Because the scope of a federal right's significance is cast in terms of the remedy provided “to enforce it,” degrading the presumptive enforceability of rights when the law does not require it will harm civil liberties.³³² This Note has

325. See *Save Our Valley*, 335 F.3d at 961 (Berzon, J., dissenting in part).

326. *Alexander v. Sandoval* held that disparate-impact regulations promulgated under § 602 of Title VI do not simply apply § 601's prohibition on intentional discrimination. 532 U.S. 275 (2001). Thus, while the DOT regulation, 49 C.F.R. § 21.5(a) (2003), which provides that “no person . . . shall” be subject to intentional discrimination under any DOT program which receives federal funds uses rights-creating language to implement § 601's prohibition on intentional discrimination, the disparate impact regulation, 49 C.F.R. § 21.5(b)(2), cannot be read as spelling out the meaning of discrimination promulgated in § 601, and as repeated in the regulation. See *Save Our Valley*, 335 F.3d at 961 (Berzon, J., dissenting in part).

327. *Save Our Valley*, 335 F.3d at 961.

328. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

329. See *Save Our Valley*, 335 F.3d at 935 (citing 49 C.F.R. § 21.5(b)(2)).

330. *Id.* (citing 49 C.F.R. § 21.5(b)(2)).

331. See *id.* at 961 (Berzon, J., dissenting in part).

332. See *Recent Cases: Federal Courts—Civil Rights Litigation—Ninth Circuit Holds That an Administrative Regulation Can Never Create an Individual Federal Right Enforceable Through § 1983—Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003), 117 HARV. L. REV. 735,

traced the history and application of § 1983, and the recent trend toward limiting its applicability in the realm of regulatory law. In *Save Our Valley v. Sound Transit*, the Ninth Circuit misapplied recent Supreme Court rulings which merge implied right of action and § 1983 analyses in only one meaningful respect. In addition, the Ninth Circuit failed to consider contemporary administrative law principles, and refused to give § 1983 broad construction, which leads to the conclusion that regulations may create rights enforceable under § 1983.

742 (2003); *see also* Davant, *supra* note 10, at 613.

THE IMPLICATIONS OF *EEOC v. WAFFLE HOUSE*: DO SETTLEMENT AND WAIVER AGREEMENTS AFFECT THE EEOC'S RIGHT TO SEEK AND OBTAIN VICTIM-SPECIFIC RELIEF?

JASON A. MCNIEL*

INTRODUCTION

On January 15, 2002, the Supreme Court surprised both business leaders and employment law attorneys with its decision in *EEOC v. Waffle House, Inc.*,¹ which held that the Equal Employment Opportunity Commission (EEOC) could seek victim-specific relief on behalf of an individual even when that individual had previously signed a mandatory arbitration agreement.² The Court's decision resolved a circuit split³ and overturned several lower court holdings, which had limited the EEOC's choice of remedies to general injunctive relief when the charging employee had agreed to settle all employment related claims through arbitration.⁴

However, despite the Court's guidance concerning mandatory arbitration agreements, the logic of the majority opinion raised several questions that have yet to be addressed by the Court.⁵ Among these questions is whether *Waffle House* allows the EEOC to recover victim-specific relief, including back pay, compensatory and punitive damages, on behalf of an employee who has settled or signed a waiver agreement with his or her employer. This Note addresses that question and explains why the Court's holding in *Waffle House* extends to situations where an employee has previously settled or waived his or her claim. Part I of this Note provides a brief description of the EEOC's responsibilities, procedures, and remedies as created under Title VII of the Civil Rights Act of

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1. 534 U.S. 279 (2002).

2. *Id.* at 288.

3. Compare *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 459 (6th Cir. 1999) (holding that the EEOC may seek both victim-specific and injunctive relief where an individual has signed a mandatory arbitration agreement), with *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 302 (2d Cir. 1998) and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 817 (8th Cir. 2000) (holding that the EEOC or its state government equivalent may seek injunctive relief but not victim-specific monetary relief where an employee has submitted himself to an arbitration agreement).

4. See *Kidder*, 156 F.3d at 302; *Nixon*, 210 F.3d at 817.

5. See Richard T. Seymour, What Hath Waffle House Wrought? (ABA Section of Labor and Employment Law ADR Committee, Midwinter Meeting, Feb. 12, 2002) (discussing various questions raised by the Court's holding in *Waffle House*).

1964,⁶ the Equal Employment Opportunity Act of 1972⁷ and the Civil Rights Act of 1991.⁸ Additionally, Part I introduces the relevant enforcement statutes and discusses two Supreme Court holdings which helped to define the scope of the EEOC's power leading up to *Waffle House*. Part II of this Note, focuses on *Waffle House*. It includes a summary of the lower court cases, which led to the Supreme Court's granting of certiorari, lays out the facts of the case, analyzes Justice Steven's majority opinion, and looks at Justice Thomas's dissent. Finally, Part III explains why *Waffle House* extends to situations where an individual has settled or waived his or her claim. It examines possible ways that a court might sidestep *Waffle House*, and discusses the case's implications.

I. TITLE VII AND THE EEOC

A. *The History and Purpose of the EEOC*

Congress enacted Title VII as part of the Civil Rights Act of 1964 with the purpose of ridding the workplace of discrimination on account of an individual's "race, color, religion, sex, or national origin."⁹ The original enforcement scheme of Title VII created the EEOC and charged it with the duty of preventing "any person from engaging in any unlawful [discriminatory] employment practice."¹⁰ Despite this charge, the Commission, as created by the 1964 Act, could not bring its own enforcement actions.¹¹ Instead, it only had authority to utilize informal methods of conciliation when attempting to resolve charges of discrimination.¹² If such informal methods failed, the EEOC's involvement in the dispute ended and the aggrieved party had thirty days to file a private cause of action.¹³ This enforcement scheme however, proved to be ineffective due to employers who consistently "shrugged off the [EEOC's] entreaties and relied upon the unlikelihood of the parties suing them."¹⁴ Thus, in an effort to strengthen the original scheme and to encourage compliance with the Act, Congress amended Title VII in 1972 to allow the EEOC to file enforcement actions on its own.¹⁵ This new scheme gave the EEOC exclusive jurisdiction over a claim for 180 days, but allowed an individual to pursue a private cause of action once that

6. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as 42 U.S.C. § 2000e (2000)).

7. Equal Employment Opportunity Act of 1972 § 701, 42 U.S.C. § 2000e (2000) (authorizing the EEOC to bring its own enforcement actions).

8. 42 U.S.C. § 1981a(a)(1) (2000) (expanding the relief available to a 'complaining party' to include compensatory and punitive damages).

9. *Id.* § 2000e-2(a)(1).

10. *Id.* § 2000e-5(a).

11. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259.

12. *See id.*

13. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260.

14. H.R. REP. NO. 92-238, at 8 (1972).

15. *Id.*

period had expired.¹⁶ Despite allowing for a private cause of action, the intention of the 1972 amendments was for the EEOC, and not individual private parties, to “bear the primary burden of litigation.”¹⁷

B. EEOC Investigatory and Enforcement Procedures

The current scheme, as created by the Civil Rights Act of 1964, and as amended by the Equal Employment Opportunity Act of 1972,¹⁸ and the Civil Rights Act of 1991,¹⁹ allows the EEOC to file suit against an employer only after attempting to resolve the dispute through conciliation.²⁰ However, before a suit can even be filed under Title VII, a charge must be filed with the EEOC alleging that the employer “has engaged in an unlawful employment practice.”²¹ A charge can be filed by a discrimination victim or by a member of the EEOC and must be filed within 180 days of the alleged unlawful practice.²² Upon receiving the charge, the EEOC must notify the employer and then perform an investigation.²³ EEOC investigations are often time consuming and expensive for an employer.²⁴ They may involve on-site visits, witness interviews, requests for statements of position, or requests for personnel policies and files.²⁵

If, after the investigation is performed, the EEOC concludes that there is reasonable cause to believe that the charge is legitimate, the Commission has thirty days to eliminate the alleged unlawful employment practice through informal conciliation.²⁶ After thirty days, if the informal conciliation process has not rendered a solution satisfactory to the EEOC, the Commission can file suit in federal court.²⁷ The aggrieved victim has the right to intervene in that lawsuit; however, he is barred from filing his own separate suit.²⁸ If no reasonable cause is found, the Commission will issue a “right-to-sue” letter to the aggrieved individual and that person has ninety days to file a private suit against the employer.²⁹

16. See 42 U.S.C. § 2000e-5(f)(1) (2000).

17. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002) (quoting *Gen. Tel. Co. of Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980)).

18. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

19. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

20. See 42 U.S.C. § 2000e-5(f)(1).

21. *Id.* § 2000e-5(b).

22. *Id.* § 2000e-5(e)(1).

23. *Id.* § 2000e-5(b).

24. The average EEOC investigation lasts 182 days. EEOC, *EEOC Investigations—What an Employer Should Know*, at <http://www.eeoc.gov/employers/investigations.html> (last modified Mar. 3, 2003).

25. *Id.*

26. See 42 U.S.C. § 2000e-5(f)(1).

27. *Id.*

28. *Id.*

29. *Id.*

Once in court, the EEOC (or in a private action the aggrieved individual) can generally request both injunctive³⁰ and compensatory relief.³¹ The original Act allowed only for injunctive relief.³² It permitted the court, upon a finding of discrimination, to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."³³ In 1991, Congress amended the Act to allow a "complaining party"³⁴ in a discrimination suit to recover both compensatory and punitive damages in addition to the remedies already available.³⁵

C. EEOC's Enforcement Powers

1. *Relevant Statutes.*—The statutes that are relevant to this Note include those that grant the EEOC the power to bring a discrimination claim in federal court, as well as those that specify the remedies available to the EEOC. The statute granting the EEOC the power to file suit in federal court is 42 U.S.C. § 2000e-5(f)(1) of the Civil Rights Act of 1972.³⁶ The sections dealing with remedies include § 2000e-5(g)(1) of the Civil Rights Act of 1964,³⁷ which gives the EEOC the authority to seek broad injunctive relief as well as reinstatement and back pay for affected employees, and § 1981a(a)(1) of the Civil Rights Act of 1991,³⁸ which permits the Commission to obtain compensatory and punitive

30. *Id.* § 2000e-5(g)(1).

31. *Id.* § 1981a(a)(1).

32. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g)(1), 78 Stat. 241, 261.

33. *Id.*

34. A "complaining party" includes both the EEOC and the aggrieved individual. 42 U.S.C. § 2000e.

35. *Id.* § 1981a(a)(1).

36. *Id.* § 2000e(5)(f)(1) states:

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

37. *Id.* § 2000e-5(g)(1) states:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

38. *Id.* § 1981a(a)(1) states that a "complaining party may recover [from the respondent] compensatory and punitive damages as allowed in subsection (b), in addition to any relief

damages on behalf of injured individuals.

2. *Supreme Court Decisions Interpreting the Scope of the EEOC's Enforcement Powers.*—

a. *Occidental Life Insurance Co. of California v. EEOC.*—In *Occidental Life Insurance Co. of California v. EEOC*,³⁹ the Supreme Court dealt with the issue of whether the EEOC is bound by state statutes of limitation when bringing a discrimination suit in federal court.⁴⁰ It held that state statutes of limitation do not bind the Commission because such limitations would undermine the enforcement scheme created by Congress to rid the workplace of discrimination.⁴¹

The Court based its opinion, in part, on its analysis of the complex enforcement scheme created by the 1972 amendments to Title VII. It noted that the scheme created a system where the EEOC “does not function simply as a vehicle for conducting litigation on behalf of private parties.”⁴² Rather, the Court noted, the Commission “is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.”⁴³ The EEOC is in fact prohibited by law from filing suit before it has attempted conciliation and performed its administrative duties.⁴⁴ Thus, the Court argued that applying state statutes of limitations to EEOC actions would undermine the EEOC’s duty to conciliate and frustrate the intent of Congress in creating the enforcement scheme.⁴⁵

b. *General Telephone Co. v. EEOC.*—In *General Telephone Co. of the Northwest, Inc. v. EEOC*,⁴⁶ the Supreme Court addressed the issue of “whether the [EEOC] may seek classwide relief under [42 U.S.C. § 2000e-5(f)(1)] . . . without being certified as the class representative under Rule 23 of the Federal

authorized by section [2000e-5(g)(1)] of the Civil Rights Act of 1964.” Subsection (b) establishes the guidelines for punitive damages:

A complaining party may recover compensatory and punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

In addition to setting out the circumstances under which a “complaining party” may recover punitive damages, subsection (b) also includes caps for the amount of punitive damages that may be awarded under the statute. The caps are determined by the number of employees working for the company, and max out at \$300,000 for companies of 500 employees or more. *Id.* § 1981a(b)(3).

39. 432 U.S. 355 (1977).

40. *Id.* at 366-67.

41. *Id.* at 368-69.

42. *Id.* at 368.

43. *Id.*

44. *Id.*

45. *Id.* at 368-69.

46. 446 U.S. 318 (1980).

Rules of Civil Procedure.”⁴⁷ The Court held that Rule 23 does not bind the EEOC when it brings an enforcement action under the statute.⁴⁸ Its holding was based on the plain meaning of the statute as well as the legislative history and purpose of Title VII and its amendments in 1972.⁴⁹

The Court found that 42 U.S.C. § 2000e-5(f)(1) plainly provides the EEOC with the “authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals.”⁵⁰ Because the EEOC’s authority is derived from § 2000e-5(f)(1), the Court found that its claim is in no way contingent upon Rule 23.⁵¹

According to the Court, this interpretation of the statute is not only consistent with its plain meaning, but it is also in accord with the purpose of the 1972 amendments to Title VII.⁵² Those amendments were intended to correct the deficiencies of the Civil Rights Act of 1964 by creating more effective federal enforcement measures.⁵³ The Court noted that under the enforcement scheme created by the 1972 amendments, “[t]he EEOC’s civil suit was intended to supplement, not replace, the [employee’s] private action.”⁵⁴ Congress’s retention of the private action, according to the Court, was proof that “the EEOC is not merely a proxy for the victims of discrimination.”⁵⁵ Despite the EEOC’s authority to pursue individualized relief, “the agency is guided by the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.”⁵⁶

In sum, both *Occidental*, and *General Telephone* upheld the idea that the EEOC’s cause of action is distinct and independent of an employee’s private cause of action. However, these cases did not decide whether that independence entailed absolute discretion in the remedies that the EEOC may seek. Specifically, this question became important in situations where employees had agreed to resolve their discrimination claims through arbitration.

II. EEOC v. WAFFLE HOUSE

A. Circuit Split: The Cases Leading to Waffle House

1. EEOC v. Kidder, Peabody & Co.: *The Second Circuit*.—In *EEOC v. Kidder, Peabody & Co.*,⁵⁷ the Second Circuit held that the EEOC could not seek

47. *Id.* at 320.

48. *Id.* at 333-34.

49. *Id.* at 323.

50. *Id.* at 324.

51. *Id.*

52. *Id.* at 325.

53. *Id.*

54. *Id.* at 326.

55. *Id.*

56. *Id.* (citation omitted).

57. 156 F.3d 298 (2d Cir. 1998).

victim-specific relief on behalf of an individual in an ADEA suit when that individual had signed a mandatory arbitration agreement.⁵⁸ The case involved seventeen investment bankers who filed a charge with the EEOC alleging that Kidder had unlawfully terminated them on account of their age. At the start of their employment with the company, each employee had signed a securities industry arbitration agreement (U-4 registration) stating that any claims arising out of their employment would be settled by binding arbitration. When Kidder discontinued its investment banking operations making it impossible for the EEOC to seek injunctive relief, the EEOC indicated that it would continue to seek back pay and liquidated damages on behalf of nine of the seventeen individuals. Kidder moved to dismiss the suit alleging that the arbitration agreements signed by the employees barred the EEOC from seeking victim-specific relief on their behalf.⁵⁹

In reaching its decision, the court relied on the Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*,⁶⁰ as well as several lower court holdings involving victims of discrimination who had previously settled, waived, or litigated their discrimination claims.⁶¹ The court found that the EEOC serves a dual role when prosecuting an employment discrimination charge. Specifically, the court reasoned that the EEOC serves as a representative of the public when it seeks broad-based injunctive relief, but it acts primarily as a representative of private individuals when it seeks victim-specific relief (i.e., back pay, compensatory and punitive damages) on behalf of an employee.⁶² The court cited both the Third and Ninth Circuits⁶³ in asserting that an individual's actions cannot affect the EEOC's right to perform its first role as the representative of the public interest.⁶⁴ The court noted that the EEOC's right to seek class-wide injunctive relief "promotes public policy and seeks to vindicate rights belonging to the United States as sovereign."⁶⁵ However, the court reached a different conclusion in regard to the EEOC's right to seek victim-specific relief on behalf of the employees. Citing the same lower court cases, the court concluded that "in seeking individual monetary relief, as opposed to class-wide injunctive relief, the EEOC does not represent the public interest to the same degree."⁶⁶ Although the

58. *Id.* at 303.

59. *Id.* at 300.

60. 500 U.S. 20, 26 (1991) (holding that ADEA claims can be resolved through arbitration).

61. *See New Orleans Steamship Ass'n v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982) (holding that res judicata precludes the EEOC from recovering on behalf of an employee who has waived, settled, or previously litigated his claim); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (holding that the EEOC's claim is "moot" when it attempts to recover victim-specific relief on behalf of an employee who has previously settled his claim).

62. *See Kidder*, 156 F.3d at 302-03.

63. *See EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990); *Goodyear Aerospace Corp.*, 813 F.2d at 1543.

64. *Kidder*, 156 F.3d 298 at 302.

65. *Id.* at 302 (quoting *Goodyear Aerospace Corp.*, 813 F.2d at 1543).

66. *Id.* at 301.

court did recognize that victim-specific relief could also benefit the public-at-large, such benefits, the court felt, would be the same regardless of whether they were obtained by the individual (in arbitration) or by the EEOC.⁶⁷ Allowing the individual to ignore his agreement to arbitrate would permit him "to make an end run" around his contract with his employer, and would violate both the Federal Arbitration Act (FAA)⁶⁸ and the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*⁶⁹

2. *EEOC v. Frank's Nursery & Crafts: The Sixth Circuit.*—In *EEOC v. Frank's Nursery & Crafts, Inc.*,⁷⁰ the Sixth Circuit disagreed with the reasoning set forth by the Second Circuit in *Kidder*, and held that the EEOC could seek victim-specific relief in a Title VII suit on behalf of an employee who had signed a mandatory arbitration agreement with his employer.⁷¹ The case involved a charge filed by Carol Adams, an African-American employee of Frank's Nursery who claimed that she was passed over for promotion because of her race. Adams had signed a mandatory arbitration agreement upon commencing her employment with the company. The EEOC filed a lawsuit under Title VII alleging unlawful discrimination on the part of the company. In its complaint, the EEOC sought both class-wide injunctive relief and individual relief on behalf of Adams. Frank's then moved to compel Adams to arbitration in accordance with the signed agreement and with the FAA. Additionally, Frank's moved to dismiss the EEOC suit on the grounds that the arbitration agreement precluded the Commission from bringing the suit. The district court granted the motion to dismiss relying on *Gilmer* and on a finding that the EEOC had not identified a class of individuals who had suffered from discrimination.⁷²

In the first part of its opinion, the appellate court used Title VII's enforcement scheme and legislative history to support its finding that the EEOC has "complete authority to decide which cases to bring to Federal district court."⁷³ The court then looked to the Supreme Court's holdings in *Occidental* and *General Telephone* and determined that "the EEOC is not merely a proxy for the victims of discrimination" and that "when the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."⁷⁴ After deciding that the EEOC did have the authority to bring suit in federal court, the court moved on to the question of the EEOC's right to seek monetary relief on behalf of the employee. The court first noted that the EEOC was not bound by an arbitration

67. *Id.* at 302-03.

68. Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2000).

69. 500 U.S. 20, 26 (1991) (holding that an ADEA claim can be resolved through arbitration).

70. 177 F.3d 448 (6th Cir. 1999).

71. *Id.* at 455.

72. *Id.* at 454.

73. *Id.* at 458 (quoting *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975)).

74. *Id.* (quoting *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980)).

agreement to which it was not a party.⁷⁵ It then rebutted the arguments made in *Kidder*, which asserted that the EEOC, by seeking victim-specific relief on behalf of an individual, does not seek to benefit the public as a whole. Rather, the court argued, “the EEOC never ceases to represent the public interest as well. Indeed, whenever the EEOC sues in its own name, it sues both for the benefit of specific individuals and the public interest.”⁷⁶ Based on this finding, the court held that Title VII authorized the EEOC to seek victim-specific relief on behalf of the employee, despite the fact that she had signed a mandatory arbitration agreement with her employer.⁷⁷

3. *Merrill Lynch v. Nixon: The Eighth Circuit.*—In *Merrill Lynch, Pierre, Fenner & Smith, Inc. v. Nixon*,⁷⁸ the Eighth Circuit addressed a case, which, like the cases discussed above, involved a discrimination charge filed by an employee who had previously signed a mandatory arbitration agreement. Anthony Hoskins, a stockbroker, lost his discrimination claim in arbitration and then filed an administrative claim with the Missouri Commission on Human Rights (MCHR), the Missouri state equivalent of the EEOC.⁷⁹ The Commission then filed suit claiming that Merrill Lynch had unlawfully discriminated against Hoskins when it terminated his employment with the company. Merrill Lynch argued that the employee’s arbitration judgment precluded the agency from bringing a separate suit.

The court relied heavily on the Second Circuit’s holding in *Kidder* in finding that the state agency could seek class-wide injunctive relief but could not seek victim-specific relief.⁸⁰ Referring to the holding in *Kidder*, the court reasoned that victim-specific relief is “highly individual in nature,” and that by seeking such relief, the state agency “acts more as a representative for [the aggrieved employee] than as a separate entity seeking to vindicate public rights.”⁸¹

B. EEOC v. Waffle House: *The Facts*

In the wake of *Kidder*, *Frank’s Nursery*, and *Nixon*, the Fourth Circuit was presented with the case of *EEOC v. Waffle House, Inc.*⁸² In *Waffle House*, Eric

75. *Id.* at 460.

76. *Id.* at 458.

77. *Id.* at 468.

78. 210 F.3d 814 (8th Cir. 2000).

79. The EEOC and state Fair Employment Practice Agencies (FEPAs) utilize worksharing agreements and a dual filing system to prevent duplicative investigations. Under 42 U.S.C. § 2000e-5(c), the EEOC must defer jurisdiction to FEPAs for sixty days or until the state proceedings have terminated. This section was designed to give state FEPAs an opportunity to resolve the dispute before the EEOC became involved. Brooks William Conover, III, *Jurisdictional and Procedural Issues Under the Texas Commission on Human Rights Act*, 47 BAYLOR L. REV. 683, 688 (1995).

80. *Nixon*, 210 F.3d at 818.

81. *Id.*

82. 193 F.3d 805 (4th Cir. 1999).

Baker, a former employee of the company, signed an agreement that stated that "any dispute or claim" regarding his employment would be settled by binding arbitration.⁸³ Sixteen days after signing this agreement, Baker suffered a seizure while at work and was subsequently fired. Baker never initiated an arbitration hearing, however he did file a timely charge of discrimination with the EEOC alleging that his discharge violated the Americans with Disabilities Act of 1990 (ADA).⁸⁴ The EEOC thereafter performed an investigation and filed an enforcement action against Waffle House in the Federal District Court for the District of South Carolina pursuant to § 107 of the ADA.⁸⁵ The complaint requested injunctive relief as well as victim-specific relief, including back pay, reinstatement, compensatory, and punitive damages.⁸⁶

Waffle House filed a Federal Arbitration Act (FAA) petition and requested that the court compel arbitration or dismiss the EEOC's action altogether. The district court denied this request and held that the agreement was not valid because it was not found in Baker's actual employment contract.⁸⁷ The court of appeals then granted an interlocutory appeal and found that Baker's employment contract did in fact contain a valid, enforceable arbitration agreement. The court then proceeded to address the question of whether the binding agreement between Baker and Waffle House in any way affected the EEOC's right to seek victim-specific relief in court on Baker's behalf.

The court of appeals found that the EEOC could seek injunctive relief but not victim-specific relief in its claim against Waffle House.⁸⁸ This decision was reached by balancing the goals of EEOC with the FAA. The court acknowledged the EEOC's "independent statutory authority to bring suit."⁸⁹ However, it held that allowing the commission to seek victim-specific relief would undermine the court's "strong policy favoring arbitration."⁹⁰ Further, it reasoned that when victim-specific relief is sought, "the EEOC's public interest is minimal, as [it]

83. The language of the agreement was as follows:

The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

Id. at 814 n.1.

84. Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12212 (2000).

85. 42 U.S.C. §12117(a).

86. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 283-84 (2002).

87. *Waffle House*, 193 F.3d at 308.

88. *Id.* at 812.

89. *Waffle House*, 534 U.S. at 284 (citing *Waffle House*, 193 F.3d at 809-12).

90. *Waffle House*, 193 F.3d at 812.

seeks primarily to vindicate private, rather than public interests.”⁹¹ Thus, the appellate court’s holding asserted that when an employee had signed a mandatory arbitration agreement, the EEOC’s remedies were limited to broad-based injunctive relief.⁹² The EEOC appealed and the Supreme Court granted certiorari in order to answer the question of “whether an agreement between an employer and an employee to arbitrate employment related disputes bars the [EEOC] from pursuing victim-specific judicial relief . . . in an enforcement action alleging that the employer has violated Title I of the [ADA] of 1990.”⁹³

C. The Majority Opinion

While the court of appeals based its decision on policy implications, the Supreme Court chose to focus on the plain language of the statute. Perhaps foreshadowing its ultimate holding, the Court began its opinion with a history of Title VII and the EEOC very similar to that found in the Sixth Circuit’s analysis in *Frank’s Nursery*.⁹⁴ Of particular importance to the Court were Congress’s 1972 and 1991 amendments to Title VII, which gave the EEOC the right to bring its own enforcement actions, and the power to recover compensatory and punitive damages. According to the Court, these new powers were intended to strengthen Title VII and give rise to an enforcement scheme where “the EEOC was intended ‘to bear the primary burden of litigation.’”⁹⁵ To further support these assertions the Court turned to its holdings in *Occidental Life Insurance Co. of California v. EEOC*⁹⁶ and *General Telephone Co. of the Northwest, Inc. v. EEOC*⁹⁷ which had dealt with the conflict between the EEOC’s enforcement role and an injured party’s private cause of action. According to the Court, these cases showed that the EEOC’s enforcement role and the injured party’s cause of action are not one in the same.⁹⁸ Thus, when the EEOC seeks to prosecute a discrimination suit in federal court it “is not merely [acting as] a proxy for the victims of discrimination.”⁹⁹ The Court then noted that the 1991 amendments (allowing for recovery of punitive and compensatory damages) were passed by Congress after the Court’s holdings in *Occidental* and *General Telephone*.¹⁰⁰ Despite Congress’s knowledge that the Court had interpreted the EEOC’s

91. *Id.*

92. *Id.*

93. *Waffle House*, 534 U.S. at 282.

94. Compare *id.* at 285-88, with *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 455-59 (6th Cir. 1999).

95. *Waffle House*, 534 U.S. at 286.

96. 432 U.S. 355, 368-69 (1977) (holding that the EEOC is not bound by a state’s statute of limitations even where it seeks monetary and injunctive relief on behalf of an injured employee).

97. 446 U.S. 318, 324 (1980) (holding that Rule 23 of the Federal Rules of Civil Procedure does not apply to the EEOC when it seeks class wide relief).

98. *Waffle House*, 534 U.S. at 287.

99. *Id.* at 288 (quoting *Gen. Tel.*, 446 U.S. at 326).

100. *Id.*

authority to be independent of an employee's private cause of action, it gave no indication that the EEOC's authority to seek compensatory or punitive damages should be limited by a mandatory arbitration agreement.¹⁰¹ Hence, the Court inferred that the unambiguous language of Title VII and the holdings in *Occidental* and *General Telephone* give the EEOC the power to bring a discrimination suit and to seek both monetary and injunctive relief.¹⁰² Further, without proof of a contrary intent by Congress, the Court found that these powers cannot be affected by an employee's agreement to arbitrate his own discrimination claims.¹⁰³

The Court next responded to the dissent's argument that the language of the relevant statutes limits the remedies available to the EEOC to "appropriate" relief as determined by the court.¹⁰⁴ According to the Court, the dissent's interpretation of the statutes was flawed for two reasons. First, the Court argued that the EEOC's authority under 42 U.S.C. § 1981a(a)(1) to obtain compensatory and punitive damages could not be limited by the term "appropriate" found in § 2000e-5(g)(1)—a totally separate section of the statute.¹⁰⁵ Second, the contention that § 1981a(a)(1)'s use of the phrase "may recover" was not, as the dissent alleged, language limiting the EEOC to remedies considered "appropriate" by the court.¹⁰⁶ Instead, the Court argued, these terms "refer to the trial judge's discretion in a particular case to order reinstatement and award damages in an amount warranted by the facts of the case."¹⁰⁷ They were not to be interpreted to permit "judge-made, *per se* rules."¹⁰⁸

The Court then proceeded to address the court of appeal's contention that the FAA limits the types of relief that the EEOC may seek when a mandatory arbitration agreement has been signed. Specifically, the Court disagreed with the lower court's assertion that "[w]hen the EEOC seeks 'make-whole' relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court."¹⁰⁹ The Court noted that by resorting to policy considerations, the court of appeals had ignored precedent,¹¹⁰ which required that the court first look "to whether the parties agreed to arbitrate a dispute . . . to determine the scope of an agreement."¹¹¹ Further, Title VII's statutory scheme makes the court of appeal's balancing test unnecessary because it unambiguously makes the EEOC the

101. *Id.*

102. *Id.*

103. *Id.* at 288.

104. *Id.* at 292.

105. *Id.*

106. *Id.*

107. *Id.* at 292-93.

108. *Id.* at 292.

109. *Id.* at 284 (quoting *EEOC v. Waffle House*, 193 F.3d 805, 812 (4th Cir. 1999)).

110. See *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

111. *Waffle House*, 534 U.S. at 294.

“master of its own case” and puts it “in command of the process” once it receives a charge of discrimination.¹¹² Thus, without textual support to the contrary, the EEOC, and not the court, has the power “to determine whether public resources should be committed to the recovery of victim-specific relief.”¹¹³

Next, the Court pointed out that even if the court of appeals was correct in resorting to policy considerations in reaching its decision, the line it drew between injunctive and victim-specific relief was unacceptable.¹¹⁴ Because victim-specific relief can also benefit the public and because injunctive relief can often be linked to an individual’s injuries, the Court found the categorization created by the court of appeals to be both overinclusive and underinclusive.¹¹⁵ The Court found that the EEOC’s statutory scheme allows that the Commission may be seeking a public benefit even where it seeks victim-specific relief.¹¹⁶

Finally, in dicta, the Court acknowledged that an employee’s conduct could have the effect of limiting the relief available to the EEOC in court.¹¹⁷ As examples, the Court recognized that lower courts have in the past limited relief to the EEOC where an employee has failed to mitigate his damages, where he has settled with his employer, or where he has previously litigated his claims.¹¹⁸ These cases recognize that “it goes without saying that the courts can and should preclude double recovery by an individual.”¹¹⁹ However, the Court noted that “[i]t is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC’s claim or the character of relief [that] the EEOC may seek.”¹²⁰

D. The Dissent

The dissent, written by Justice Thomas, argued that the majority opinion was flawed for two reasons: (1) it conflicted with the language of the FAA and Title

112. *Id.* at 291.

113. *Id.* at 291-92.

114. *Id.* at 294.

115. The categorization is overinclusive because victim-specific relief such as punitive damages are, by their very nature, intended to punish tortfeasors and to benefit the public by deterring future unlawful conduct. *Id.* at 294-95. The categorization is underinclusive because “while injunctive relief may appear more ‘broad based,’ it nonetheless is redress for individuals.” *Id.* at 295 (quoting *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 383 (1977)).

116. *Id.* at 296.

117. *Id.*

118. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982) (holding that an employee cannot recover under Title VII if he has failed to mitigate his damages); *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990) (holding that res judicata precludes the EEOC from recovering victim-specific relief on behalf of an employee who has previously litigated his claim); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542 (9th Cir. 1987) (holding that the EEOC’s claim to victim-specific relief is “mooted” by the injured employee’s settlement with his employer).

119. *Waffle House*, 534 U.S. at 297 (quoting *Gen. Tel. Co.*, 446 U.S. at 333).

120. *Id.*

VII; and (2) because it violated the basic principle that the EEOC "must take a victim of discrimination as it finds him."¹²¹

According to the dissenters, the language of Title VII leaves it in the hands of the courts to decide which remedies are "appropriate."¹²² Specifically, Justice Thomas argued that 42 U.S.C. § 2000e-5(g)(1) which gives the courts power to order "such affirmative action as may be appropriate" applies not only to injunctive relief, but also to the compensatory and punitive damages authorized by 42 U.S.C. § 1981a(a)(1).¹²³ Thus, according to Justice Thomas, the court, and not the EEOC, is vested by Title VII with the power to determine the remedies available to the Commission in a discrimination suit.¹²⁴

The dissent next argued that the majority's decision violated the language of the FAA. The true question, argued Justice Thomas, was not "whether the EEOC should be bound by Baker's agreement to arbitrate. Rather, it was whether a court should give effect to the arbitration agreement . . . or whether it should instead allow the EEOC to reduce that arbitration agreement to all but a nullity."¹²⁵ The dissenters felt that the FAA required that the agreement be given effect.¹²⁶

In addition to the language of the statute, the dissent argued that the majority's decision violated the accepted principle that the EEOC "must take a victim of discrimination as it finds him."¹²⁷ In short, according to this principle, the EEOC's ability to seek victim specific relief is dependent upon the victim's ability to obtain such relief for himself.¹²⁸ This is so, Justice Thomas argued, because "when the EEOC is seeking [victim-specific relief] it is only serving the public interest to the extent that an employee seeking the same relief for himself through litigation or arbitration would also be serving the public interest."¹²⁹ Consequently, the dissent argued that it is only when the EEOC seeks broad-based injunctive relief, "that its unique role in vindicating the public interest comes to the fore."¹³⁰

Lastly, the dissent raised concerns as to the possible implications of the majority's decision. In particular, Justice Thomas worried about the effect that the decision could have on private settlements and arbitration judgments. He noted that "after this decision . . . an employee's decision to enter into a settlement agreement with his employer no longer will preclude the EEOC from obtaining relief for that employee in court."¹³¹ Also, in regard to arbitration

121. *Id.* at 298.

122. *Id.* at 301.

123. 42 U.S.C. § 2000e-5(g)(1) (2000); 42 U.S.C. § 1981a(a)(1).

124. *Waffle House*, 534 U.S. at 301.

125. *Id.* at 308-09.

126. *Id.* at 298-99.

127. *Id.* at 298.

128. *Id.* at 305.

129. *Id.* at 307.

130. *Id.*

131. *Id.* at 311.

judgments, he commented that “[a]ssuming that the Court means what it says, an arbitral judgment will *not* preclude the EEOC’s claim for victim-specific relief from going forward, and courts will have to adjust damages awards to avoid double recovery.”¹³² These concerns, Thomas argued, further supported the position that in drafting Title VII, Congress intended that the EEOC must take a victim of discrimination as it finds him.¹³³

III. *WAFFLE HOUSE* EXTENDED TO PRIVATE SETTLEMENTS AND ARBITRATION JUDGMENTS

A. *The Issue*

Waffle House established that, at least where a mandatory arbitration agreement has been signed, the EEOC does not have to “take a victim of discrimination as it finds him.”¹³⁴ The Court asserted that the EEOC is the “master of its claim” and that it can seek victim-specific relief in court even where the victim, because of a mandatory arbitration agreement, cannot legally do so himself. However, dicta found at the end of the opinion seems to limit the Court’s findings. Specifically, the Court’s acknowledgment that a victim’s conduct “may have the effect of limiting the relief that the EEOC may obtain in court”¹³⁵ raises the question of whether the EEOC is truly the “master of its claim.”¹³⁶ Is the lofty title of “master” taken away when an employee waives his claim or chooses to settle with his employer without EEOC approval? If the employee can affect the EEOC’s choice of remedies is the Commission really in “command of the process?”¹³⁷ The Court in *Waffle House* warned that the EEOC’s choice of remedies might be limited in certain circumstances by the mootness doctrine and by res judicata.¹³⁸

B. *Potential Limits to Waffle House*

According to dicta found in *Waffle House*, “ordinary principles of res judicata, [and] mootness . . . may apply to EEOC claims.”¹³⁹ While it is true that the lower courts have used these doctrines to deny victim-specific relief to the EEOC,¹⁴⁰ there is no language in Title VII to indicate that they can or should be enforced against the Commission. Despite the straightforward language of the statute, courts have attempted to limit its scope to prevent the seemingly unfair

132. *Id.* at 310 (emphasis in original).

133. *See id.* at 298.

134. *Id.*

135. *Id.* at 296.

136. *Id.* at 291.

137. *Id.*

138. *Id.* at 296-97.

139. *Id.* at 298 (emphasis added).

140. *See supra* note 118.

situation where an employee gets "two bites at the apple."¹⁴¹ However, in light of the Supreme Court's warning, it is necessary to look at how courts have applied these doctrines in an effort to prevent double recovery.

1. *Mootness Doctrine*.—The mootness doctrine could potentially limit the EEOC's ability to seek victim-specific relief on behalf of an employee who has settled or waived his claim. The doctrine applies to an action where "the issues are no longer live or the parties lack a legally cognizable interest in the outcome."¹⁴² The *Waffle House* majority cited the Ninth Circuit's decision in *EEOC v. Goodyear Aerospace Corp.* as an example of how the doctrine of mootness may be applied to the EEOC and its choice of remedies.¹⁴³

In *Goodyear*, the EEOC filed suit on behalf of Marshaline Pettigrew, a black Goodyear employee, claiming that the company had violated § 706(f)(1) of Title VII of the Civil Rights Act of 1964. In its claim, the Commission sought injunctive relief, as well as back pay under 42 U.S.C. § 2000e-5(g)(1). Shortly after the EEOC filed the suit, Pettigrew reached a settlement agreement with Goodyear. The settlement gave Pettigrew the promotion she sought, as well as a promise from Goodyear not to retaliate. In return, Pettigrew signed an agreement releasing Goodyear from all claims. The company then moved to dismiss, claiming that the settlement agreement had rendered the EEOC's suit moot. The court held that the EEOC could go forward with its request for injunctive relief; however, it found that the Commission's claim for back pay was moot.¹⁴⁴ The court reasoned that Pettigrew had contracted away her right to recover, and that "the public interest in a back pay award [was] minimal."¹⁴⁵

The logic used by the *Goodyear* court in applying the mootness doctrine is doubtful in light of *Waffle House*. In fact, the court based its holding on two arguments that were explicitly rejected by the *Waffle House* majority. First, the court argued that the EEOC could not recover on behalf of Pettigrew because Pettigrew had contracted away her right to recover from Goodyear.¹⁴⁶ However, *Waffle House* made it clear that the EEOC could not be bound by an agreement to which it was not a party.¹⁴⁷ Second, the court in *Goodyear*, drew the same distinction between broad-based injunctive relief and victim-specific relief that was criticized by the Court in *Waffle House*.¹⁴⁸ The *Goodyear* court's argument that back pay provides only a minimal benefit to the public was rejected by the

141. *Id.* at 310.

142. *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542 (9th Cir. 1987).

143. *Waffle House*, 534 U.S. at 296-97 (citing *Goodyear*, 813 F.2d at 1542).

144. *Goodyear*, 813 F.2d at 1543.

145. *Id.*

146. *Id.* at 1542.

147. *Waffle House*, 534 U.S. at 294 (stating "[i]t goes without saying that a contract cannot bind a non-party").

148. *Goodyear*, 813 F.2d at 1572; *Waffle House*, 534 U.S. at 294 ("[T]he line drawn by the Court of Appeals between injunctive and victim-specific relief creates an uncomfortable fit with its avowed purpose of preserving the EEOC's public function while preserving the EEOC's public function while favoring arbitration.").

Waffle House majority which stated that “we are persuaded that . . . whenever the EEOC chooses . . . to bring an enforcement action in a particular case, [it] may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief.”¹⁴⁹

In short, the applicability of the mootness doctrine depends on whether an employee’s private settlement or waiver agreement will, in all cases, vindicate the public interest represented by the EEOC. If in fact, there are situations where the public is not vindicated by a private settlement, then the mootness doctrine should not apply. The Supreme Court has yet to directly address this issue. However, it has given hints as to how it might be resolved in future cases. Specifically, the Court has indicated that an individual’s monetary interest in a discrimination claim might not be equal to the interest of the public. In *General Telephone*, the Supreme Court noted that every EEOC suit included the EEOC’s claim “to vindicate the public interest in preventing employment discrimination.”¹⁵⁰ Further, the Court noted that the EEOC’s interests could potentially conflict with individual interests, and that the EEOC may not be an adequate representative for injured individuals.¹⁵¹ If the EEOC is not an adequate representative for an individual, it would seem that the opposite should also be true—an individual may not be an adequate representative for the EEOC because his individual interests may well conflict with the interests of the public. Thus, in light of the Court’s reasoning in *Waffle House* and *General Telephone*, the mootness doctrine should not be utilized to bar EEOC recovery where an employee has settled or waived his or her claims. This assertion is further supported by the language, history, and purpose of the statutes as discussed in Part III.C.

2. *Res Judicata*.—Another way that courts have attempted to limit the EEOC’s ability to seek victim specific relief is by invoking the doctrine of res judicata (claim preclusion).¹⁵² Res judicata has typically been used in situations where an employee has previously litigated or arbitrated his or her claim. However, the doctrine might also be invoked in situations involving a court supervised settlement agreement. “Claim preclusion . . . requires a showing that

149. *Waffle House*, 534 U.S. at 295-96; see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (“If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that ‘provides the spur or catalyst which causes employers and unions to self-examine and to self evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.’”) (citing *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

150. *Gen. Tel. Co. of Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980).

151. *Id.* at 331; see also *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 458 (6th Cir. 1999) (citing *Gen. Tel. Co.*, 446 U.S. at 331).

152. See *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (holding that the doctrine of res judicata precludes the EEOC from filing suit and seeking victim-specific relief where an individual has previously litigated his claim); *EEOC v. U.S. Steel Corp.*, 921 F.2d 489 (3d Cir. 1990).

there has been (1) a final judgment on the merits in a prior suit involving (2) the same claim and (3) the same parties or their privies.”¹⁵³ In applying claim preclusion as it relates to this issue, courts have recognized the fulfillment of the first two requirements, but have disagreed on whether the third is satisfied.¹⁵⁴ Thus, the question to be answered is whether Congress, in passing Title VII, intended to create an enforcement scheme where the EEOC and injured employees are in privity. The Court’s reasoning in *Waffle House* raises doubts as to whether such a relationship was intended.

The *Waffle House* Court cited *EEOC v. U.S. Steel Corp.*, as an example of how claim preclusion might be applied.¹⁵⁵ In *U.S. Steel*, the EEOC filed a complaint on behalf of several employees who, upon termination, had been required to sign an agreement releasing the company of all claims before receiving a lucrative benefits package. Prior to the filing of the EEOC suit, several employees included in the EEOC suit had unsuccessfully sued the company on the same claims. The district court held that res judicata did not bar the EEOC from seeking both injunctive and victim-specific relief in court.¹⁵⁶ However, the Third Circuit reversed and held that res judicata did preclude the EEOC from seeking victim-specific relief on behalf of the employees, but it left undecided the issue of whether the doctrine could be used to limit the Commission’s right to obtain broad-based injunctive relief.¹⁵⁷

The *U.S. Steel* court’s reasoning is, again, strikingly similar to the line of reasoning rejected by the Supreme Court in *Waffle House*. Essentially, the Third Circuit argued that the EEOC acts as a representative of, and is in privity with, an aggrieved employee when it seeks victim-specific relief on the victim’s behalf. Thus, the Commission is precluded by representative claim preclusion from seeking such relief where that employee has previously litigated his claim or submitted it to arbitration.¹⁵⁸ However, in *Waffle House* the Court found that the EEOC and Baker were not in privity for the purposes of a mandatory arbitration agreement.¹⁵⁹ If the EEOC is not in privity with an employee who contracts away his right to recover in court, it should follow that no privity exists between the Commission and an employee who chooses to litigate his claim or submit it to arbitration. This reasoning is consistent with the Court’s finding that “the EEOC is not merely a proxy for the victims of discrimination.”¹⁶⁰ Further, the *U.S. Steel* court’s argument supporting the use of res judicata appears to be at odds with the Supreme Court’s finding that victim-specific relief is intended to benefit both the

153. *U.S. Steel Corp.*, 921 F.2d at 493.

154. Compare *id.*; *Harris Chernin, Inc.*, 10 F.3d at 1291, with *Frank’s Nursery & Crafts, Inc.*, 177 F.3d at 463.

155. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002).

156. *U.S. Steel Corp.*, 921 F.2d at 492.

157. *Id.* at 496.

158. *Id.*

159. *Waffle House, Inc.*, 534 U.S. at 294.

160. *Id.* at 288 (quoting *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980)).

injured employee as well as the general public.¹⁶¹ The Supreme Court has stated that even when the EEOC acts on behalf of an individual, “it acts also to vindicate the public interest in preventing employment discrimination.”¹⁶² This language indicates that the EEOC, as a representative for the public, is not in privity with private individuals under the enforcement scheme of Title VII. As with the mootness doctrine, this assertion is further supported by statutory language, history, and purpose, discussed in Part III.C.

C. *The Implications of Waffle House*

1. *Statutory Interpretation—*

a. *Section 2000e-5(f)(1): The EEOC’s Authority to Bring a Discrimination Suit on Its Own.*—Section 2000e-5(f)(1) lays out the circumstances under which the EEOC is permitted to bring a discrimination suit in federal court.¹⁶³ The statute simply states that a civil suit may be filed against “any respondent”¹⁶⁴ whenever the EEOC has been unable to reach a settlement through conciliation that is “acceptable to the Commission.”¹⁶⁵ Two important points can be taken from this language. First, Congress did not choose to condition the EEOC’s power to file suit against “any respondent,” on whether an injured employee had decided to privately satisfy her claims. Rather, the plain language of the statute gives the Commission an independent cause of action and permits it to bring suit on any occasion where conciliation has failed. Second, Congress made it clear that unless a settlement agreement is “acceptable to the Commission” the EEOC will be permitted to bring a civil action. Thus, it follows that if a private settlement is not agreeable to the EEOC, then the Commission will not be barred from filing suit. This interpretation is embraced in the Court’s findings in *General Telephone* and *Occidental* and has been virtually unquestioned by the lower courts.¹⁶⁶ However, while it is accepted that the EEOC has been given an independent cause of action, there has been no such consensus on the types of remedies that the Commission may request in situations where an employee has taken private action to satisfy her claims.

161. *Id.* at 296.

162. *Gen. Tel. Co.*, 446 U.S. at 326.

163. *See* 42 U.S.C. § 2000e-5(f)(1) (2000).

164. Suit may be filed except for cases where the respondent is a government, governmental agency, or political subdivision named in the charge. *Id.*

165. *Id.*

166. *See, e.g., Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 324 (1980); *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368 (1977); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 817 (8th Cir. 2000) (holding that the EEOC or its State government equivalent may seek injunctive relief but not victim-specific monetary relief where an employee has submitted himself to an arbitration agreement); *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 459 (6th Cir. 1999) (holding that the EEOC may seek victim-specific on behalf of an individual who has signed a mandatory arbitration agreement); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 302 (2d Cir. 1998).

b. Section 2000e-5(g)(1) and § 1981a(a)1: The Remedies available to the EEOC.—Congress has provided two separate provisions that set out the EEOC's choice of remedies in discrimination cases. The first provision, 42 U.S.C. § 2000e-5(g)(1), permits a court, upon a finding of discrimination, to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be *appropriate*, which may include . . . reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief that the court deems *appropriate*."¹⁶⁷ The second remedies provision, § 1981a(a)(1), states that in addition to the remedies made available by § 2000e-5(g)(1), a "complaining party *may* recover compensatory and punitive damages."¹⁶⁸ These statutes and their use of the discretionary terms "appropriate" and "may recover" have caused some confusion in the courts. In particular, they raise the question of whether this language permits a court to deny "victim-specific" relief to the EEOC on a *per se* basis.¹⁶⁹ Several courts in reaching their holdings have appeared to rely on such *per se* rules.¹⁷⁰

However, in light of *Waffle House*, these holdings are now in doubt. In *Waffle House*, the Court seemed to distinguish between the EEOC's statutory authority to seek victim-specific relief, and its authority to obtain such relief. The Court made it clear that "[a]bsent textual support for a contrary view, it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief."¹⁷¹ Because Congress has not expressly limited the EEOC's power to seek victim-specific relief on behalf of an employee who has settled his claim, it should follow that no such limitation exists. Thus, "the statutory text unambiguously authorizes [the EEOC] to proceed in a judicial forum."¹⁷²

In determining the EEOC's statutory authority to obtain victim-specific relief when it has proved its case of discrimination, it is necessary to look to the discretionary language of the statutes. According to *Waffle House*, the terms "appropriate" and "may recover" do not authorize an interpretation, which permits "judge-made, *per se* rules."¹⁷³ Such an interpretation would, in effect, strip the agency of the discretion granted to it by Congress in seeking victim-specific relief. The proper interpretation, according to the Court, gives discretion

167. 42 U.S.C. § 2000e-5(g)(1) (emphasis added).

168. *Id.* § 1981a(a)(1) (emphasis added).

169. *See* EEOC v. *Waffle House, Inc.*, 534 U.S. 279, 292-93 (2002).

170. *See, e.g., Kidder, Peabody & Co.*, 156 F.3d at 303 ("[T]o permit an individual . . . to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages on his or her behalf would undermine the *Gilmer* decision and the FAA."); *Merrill Lynch*, 210 F.3d at 818 ("We agree, however, with . . . Equal Employment Opportunity Commission v. *Kidder, Peabody and Company, Inc.* . . . which held that in circumstances similar to ours an arbitration agreement precludes the EEOC from seeking purely monetary relief for an employee but does not preclude it from seeking injunctive relief.").

171. *Waffle House*, 534 U.S. at 291-92.

172. *Id.* at 292.

173. *Id.*

to a trial judge “in a particular case to order reinstatement and award damages in an amount warranted by the facts of that case.”¹⁷⁴ It does not however, “permit a court to announce a categorical rule precluding an expressly authorized form of relief as inappropriate in all cases.”¹⁷⁵

In short, the Court’s interpretation of § 2000e-5(g)(1) and § 1981a(a)(1) seems to authorize the EEOC to seek victim-specific relief on behalf of an employee who has previously settled or waived his or her claim so long as the Commission determines that it is in the public’s best interest to do so. The question still unanswered, however, is whether a court can ever find that “victim-specific” relief is “warranted by the facts” of a case, where an employee has reached a settlement agreement with his or her employer. While the EEOC can clearly seek victim-specific relief, a finding that the relief is warranted is necessary for the EEOC to obtain that relief on behalf of an employee. The Court’s reasoning in *Waffle House*, *General Telephone*, and *Albemarle Paper* seem to indicate that a court would be justified in making such a finding.

In *Albemarle Paper*, the Court stated that when deciding whether to grant or deny back pay under § 2000e-5(g)(1), a judge should make his decision “in light of the large objectives of the Act.”¹⁷⁶ Those objectives, according to the Court, are 1) “to achieve equality of employment opportunities”¹⁷⁷ and 2) “to make persons whole for injuries suffered on account of unlawful employment discrimination.”¹⁷⁸ In appropriate cases, a court could promote both of these objectives by permitting the EEOC to recover victim-specific relief for an employee who settled with his employer.

In regard to the first objective, the Supreme Court has made it clear that “the [EEOC] may be seeking to vindicate a public interest . . . even when it pursues entirely victim-specific relief.”¹⁷⁹ The Court has also recognized that the interests of an employee may not be equal to the interests of the public.¹⁸⁰ Because the private and public interests may not be the same, there exists a real possibility that a private settlement will not sufficiently satisfy the public interest. Extending *Waffle House* to waivers and settlement agreements would allow the EEOC to satisfy the public interest in these situations.

In regard to the second objective of the Act, allowing the EEOC to recover victim-specific relief despite the existence of a settlement or waiver agreement, would ensure that injured employee is truly “made whole” by his compensation. “[T]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard

174. *Id.* at 292-93.

175. *Id.* at 293.

176. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).

177. *Albemarle Paper Co.*, 422 U.S. at 418 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

178. *Id.*

179. *Waffle House*, 534 U.S. at 296.

180. *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 333 (1980).

by which the former is to be measured.”¹⁸¹ In certain instances, the high costs involved in litigating a discrimination claim may force an employee to give up his or her claim or accept a lower than adequate settlement payout.¹⁸² This cost factor strongly favors employers who are more likely to have the financial resources to thoroughly litigate a claim.¹⁸³ However, allowing the EEOC to recover victim-specific relief would help to prevent these inequitable situations and will ensure that the compensation paid to the employee is equal to the injury inflicted. This, when coupled with the strong public policy in favor of ridding the workplace of discrimination, gives additional justification for allowing the EEOC to recover on behalf of employees who have reached settlements deemed unacceptable by the Commission. Thus, if an employee has settled for less than he or she is entitled to, and the EEOC decides that it would be in the public’s best interest to seek additional relief on that employee’s behalf, the Commission should be entitled to seek such relief. By allowing the EEOC to take such action, the court would be furthering the public interest as well as ensuring the injured employee full recovery for his injuries.

This assertion does not mean that an employee should be permitted double recovery for his injuries. The Court has made it clear that it “goes without saying that the courts can and should preclude double recovery by an individual.”¹⁸⁴ However, the discretionary language of 42 U.S.C. § 2000e-5(g)(1) and § 1981a(a)(1) unambiguously give a judge the power to limit the EEOC’s recovery of victim-specific relief by the amount of the employee’s prior settlement agreement. Thus, if an employee settles his or her claims for \$10,000, and the EEOC later receives \$100,000 on his or her behalf in court, the judge would be permitted under § 2000e-5(g)(1) and § 1981a(a)(1) to reduce the award of damages by \$10,000.¹⁸⁵ This approach would allow both the employee and the public to receive compensation equal to their injuries. The employer, who will likely be in court anyway,¹⁸⁶ will simply be forced to pay the amount that it should have paid in the first place. Thus, an employer cannot argue that it has been “improperly and substantially prejudiced” by the court’s action.¹⁸⁷ As the Supreme Court held, “[o]f course, Title VII defendants do not welcome the prospect of backpay liability; but the law provides for such liability and the

181. *Albemarle Paper Co.*, 422 U.S. at 418.

182. Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, KAN. J.L. & PUB. POL’Y 141, 158 (2001).

183. *Id.*

184. *Waffle House*, 534 U.S. at 297.

185. *See id.* at 310.

186. Where the EEOC has found reasonable cause to believe that discrimination has taken place, courts have uniformly allowed the Commission to seek broad-based injunctive relief. *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 468 (6th Cir. 1999). Thus, even if employers were shielded from victim-specific liability where an employee had previously settled, they would likely still face the litigation costs related to an EEOC action seeking injunctive relief. *See Senich v. American-Republican, Inc.*, 215 F.R.D. 40, 45 (D. Conn. 2003).

187. *Albemarle Paper Co.*, 422 U.S. at 424.

EEOC's authority to sue for it."¹⁸⁸

Nor does such an approach significantly undermine settlement agreements between an employer and an employee. As the Court in *Waffle House* noted, "[w]hen speculating about the impact this decision might have on the behavior of employees and employers, we think it is worth recognizing that the EEOC files suit in less than one percent of the charges filed each year."¹⁸⁹ Instead of undermining the sanctity of settlement agreements, this approach would have the effect of strengthening the EEOC and its ability to pursue the public interest.

2. *The Furtherance of Congressional Intent.*—Allowing the EEOC to pursue victim-specific relief despite the existence of a settlement agreement or waiver would not only further the general purposes of Title VII, but it would also give the Commission the power and discretion that Congress originally intended. As noted in Part I, *supra*, the original Act, as written in 1964, merely permitted the EEOC to investigate claims of discrimination and to seek voluntary settlements through informal conciliation measures.¹⁹⁰ Because this arrangement proved to be ineffective in enforcing the Act, Congress decided to overhaul the enforcement scheme.¹⁹¹ Hence, in 1972 Congress passed the Equal Employment Opportunity Act which created a new enforcement scheme in which "[t]he EEOC was to bear the primary burden of litigation."¹⁹² This new scheme granted the EEOC its own enforcement action while retaining the employee's private action.¹⁹³ Concerned with duplicative proceedings, Congress granted the EEOC exclusive jurisdiction over all claims for 180 days after a discrimination charge is filed.¹⁹⁴ However, recognizing that the Commission would be unable to successfully resolve all claims, Congress allowed injured employees to file suit after that 180-day period had expired.¹⁹⁵ The result of this complicated scheme is that most discrimination suits continue to be brought by private individuals, while the EEOC, with its limited resources, selects for litigation only those charges that most effectively further the public interest in enforcing the Act.¹⁹⁶ Thus, for the Commission to most fully represent the public, it must have a representative pool of discrimination charges to select from.¹⁹⁷

Consequently, any rule tending to limit the EEOC's pool of charges also works to undermine the complicated enforcement scheme created by Congress.¹⁹⁸ For this reason, the Supreme Court has "generally been reluctant to approve rules

188. *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 324 (1980).

189. *Waffle House*, 534 U.S. at 290 n.7.

190. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259.

191. See *Frank's Nursery & Crafts, Inc.*, 177 F.3d at 457.

192. *Gen. Tel. Co.*, 446 U.S. at 326.

193. See *Frank's Nursery & Crafts*, 177 F.3d at 457.

194. See 42 U.S.C. § 2000e-5(f)(1) (2000).

195. See *Frank's Nursery & Crafts*, 177 F.3d at 457.

196. Although 21,032 employment discrimination lawsuits were filed in 2000, only 291 were filed by the EEOC. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002).

197. See *id.* at 296 n.11.

198. *Id.*

that may jeopardize the EEOC's ability to investigate and select cases from a broad sample of claims."¹⁹⁹ Because employees would no longer have an incentive to file a charge with the EEOC, the denial of victim-specific relief to the Commission would have exactly this type of limiting effect. An employee does retain the right to file a claim with the EEOC even after signing a settlement agreement.²⁰⁰ However, without the prospect of additional damages, the incentive to do so is severely reduced. The result will be that fewer individuals will take the step of filing a charge with the EEOC. This has the effect of completely cutting the Commission out of the enforcement process. Not only is it prohibited from pursuing its statutorily authorized remedies, but it is also left unaware that the discrimination ever took place. Denying victim-specific relief thus undermines the enforcement scheme put in place by Congress by deterring the filing of discrimination charges and limiting the pool of charges from which the EEOC can choose.

3. *Practical Effects of Waffle House.*—

a. *The EEOC and society.*—The EEOC and the public at large stand to benefit the most from an extension of *Waffle House* to settlement agreements. Although once labeled a "toothless tiger,"²⁰¹ the EEOC today is responsible for enforcing four federal anti-discrimination Acts.²⁰² In enforcing these acts, the Commission depends heavily on the discretion granted to them by Congress in choosing to litigate discrimination cases that most effectively further the public interest.²⁰³ By upholding the EEOC's right to seek victim-specific relief, the courts would ensure that the Commission has a truly representative pool of claims from which to choose. Additionally, because the EEOC "is guided by 'the overriding public interest in equal employment opportunity'"²⁰⁴ the public will benefit when the Commission is permitted to perform its duty effectively.

From a practical standpoint, such an extension will not likely have a significant effect on the enforcement priorities of the EEOC. Admittedly, cases where an employee has already settled will often be less attractive to the Commission. This point, when coupled with the EEOC's litigation history, makes it unlikely that the Commission will bring a significant amount of cases involving a prior settlement. It is more probable that the EEOC will only pursue such a case in those rare instances where the public interest can be furthered, despite the existence of a settlement agreement or waiver. These instances will

199. *Id.*

200. *See* EEOC v. Cosmair, Inc., 821 F.2d 1085, 1090 (5th Cir. 1987).

201. *See* ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 59 (1971).

202. The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), and the Americans With Disabilities Act (ADA). EEOC, *National Enforcement Plan* para. I, available at <http://www.eeoc.gov/abouteeoc/plan/nep.html> (last modified Jan. 15, 1997) [hereinafter *National Enforcement Plan*].

203. *Id.* at para. II.C.

204. *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (quoting 118 Cong. Rec. 4941 (1972)).

likely involve cases where an employee has accepted an unreasonably low settlement, or waived his or her claims without just compensation.²⁰⁵

The EEOC's strong support for voluntary dispute resolution provides additional comfort to employers who fear a significant shift in the Commission's enforcement policies. Because the EEOC cannot litigate every claim that is filed, it is forced to rely heavily on conciliation and alternative dispute resolution in performing its duties. The Commission has issued a pre-*Waffle House* policy statement stating that an "employer will be shielded against any further recovery by the charging party" in cases where a waiver or settlement agreement has been signed.²⁰⁶ Although *Waffle House* seems to have altered the EEOC's view towards waivers and settlements,²⁰⁷ it will probably take a strong case to convince the Commission to pursue litigation where a waiver or settlement is involved.

b. Employers.—*Waffle House*'s most significant effect on employers is that it strips them of the finality that was once achieved through settlement agreements and arbitration judgments. This lack of finality could potentially lead to several reactions: 1) employers may be less likely to settle or arbitrate discrimination claims, 2) employers may lower the amounts paid to employees in discrimination settlement agreements in an attempt to compensate for the possibility of a double payout, 3) employers may begin to seek supervised settlements with the EEOC,²⁰⁸ and finally, 4) employers may seek to provide fairer settlement offers which specifically address the claims of charging employees.

Given the small number of cases that the EEOC brings each year, *Waffle House* will probably not significantly affect employers' willingness to settle or arbitrate a claim. From a financial standpoint, it is probably still in the employers' best interest to settle his or her claim rather than risk a large jury verdict. The EEOC chooses to pursue litigation for only a very small percentage of the charges that it receives.²⁰⁹ Although the EEOC does not keep track of how

205. See *Senich v. American-Republican, Inc.*, 215 F.R.D. 40, 44-45 (D. Conn. 2003) (holding that a waiver signed by employees did not bar the EEOC from seeking victim-specific relief on their behalf, in part because their injuries were not fully compensated).

206. *Enforcement Guidance on Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes*, in 2 EEOC COMPLIANCE MANUAL 915.002 (Apr. 10, 1997).

207. See *Senich*, 215 F.R.D. at 42.

208. Coolidge, Wall, Womsley & Lombard, Co. L.P.A., *Enforceability of Severance Agreements Against the EEOC*, at 3 (2003), at <http://www.coollaw.com/documents/228.pdf> [hereinafter Coolidge].

209. In 2002, the EEOC only filed suit for 364 of the 61,459 complaints that it received. However, for those employers who the EEOC does choose to target, the price can be steep. In 2002, the average employer sued by the EEOC paid \$145,575. This is down from 1997 and 1998 when employers paid an average of \$345,575 and \$232,360 respectively. See *EEOC Litigation Statistics, FY1992 through FY2004*, available at <http://www.eeoc.gov/stats/litigation.html> (last modified Jan. 27, 2005) [hereinafter *EEOC Litigation Statistics*].

many suits are filed against employers who have already settled their claim with the employee, it is a safe bet that very few of those suits involve a waiver.²¹⁰ Also important is the fact that by signing a waiver as part of a settlement agreement, an employee effectively bars himself or herself from filing his or her own private discrimination suit.²¹¹ This means that in a very large percentage of cases "the employer's increased exposure will be limited to the cost of investigating and defending discrimination claims at the administrative level."²¹² Even if an employer is forced to pay out twice, the damages that it will be forced to pay will likely be reduced by the amount paid to the employee in the settlement agreement or arbitration judgment.²¹³ Thus, total payouts by employers will be limited and employees will be precluded from collecting windfall judgments. There is a possibility that as plaintiffs' lawyers begin to catch on to *Waffle House* and its holding that they will encourage their clients to accept a settlement agreement and then subsequently file a suit with the EEOC.²¹⁴ However, even such an increase in charges filed does not change the fact that the EEOC pursues litigation for less than one percent of the charges received.²¹⁵

Although employers will probably not be deterred from entering settlement agreements, they may begin to lower settlement offerings in anticipation of an EEOC suit.²¹⁶ By lowering discrimination settlement payouts, employers might be able to offset the risk of an EEOC suit and negative judgment. There is however a downside to this approach. First, lower settlement offerings would likely lead to increased litigation costs as employees opt to file suit in court instead of settling their claims. Second, by offering an employee significantly less than he or she deserves, an employer opens himself or herself up to higher scrutiny by the EEOC.

A third approach that might be taken by employers would be to seek supervised settlements with the EEOC.²¹⁷ Under this approach, the employer might simply require employees to file a claim with the EEOC prior to offering a settlement where discrimination is a potential issue.²¹⁸ After the claim has been filed, the employer can work with both the EEOC and the employee to reach an agreement that is acceptable to all sides. While this approach might lead to higher settlement costs, it would also likely give employers more certainty by bringing the EEOC into a settlement negotiation where discrimination is a

210. See Coolidge, *supra* note 208, at 2.

211. *Id.*

212. *Id.*

213. See EEOC v. Waffle House, Inc., 534 U.S. 279, 297 (2002) (stating that an employee's failure to mitigate damages or his acceptance of a monetary settlement will limit amount recovered by the EEOC).

214. See Coolidge, *supra* note 208, at 2.

215. EEOC Litigation Statistics, *supra* note 206.

216. See Coolidge, *supra* note 209, at 3.

217. *Id.*

218. *Id.*

potential issue.²¹⁹

A fourth and final possibility is that employers may begin to exercise more care by offering fairer settlements in situations where discrimination likely occurred. Although offering fair settlement amounts does not guarantee that the EEOC will not pursue litigation, it makes it less likely.²²⁰ Given the EEOC's litigation history and policy of strategically choosing its cases to pursue, it seems unlikely that a fair settlement would be targeted by the Commission.

c. *Employees*.—Of all the parties involved, the employee will be the least affected by an extension of *Waffle House* to settlement agreements. An employee who has settled or waived his or her claims is not permitted to file a private discrimination suit against his or her employer. Thus, in order to receive compensation in addition to the settlement amount, the employee will be forced to file a charge with the EEOC and then hope that the Commission decides to litigate the case.²²¹ Given the EEOC's litigation history, the odds of this happening are extremely low. However, the possibilities of additional recovery will likely cause employees to file charges with the Commission despite their settlement or waiver agreement. It costs nothing to file a discrimination charge and plaintiff's lawyers will likely encourage such action once the holding in *Waffle House* becomes more widely known.²²² Finally, an extension of *Waffle House* to settlements and waivers would give the EEOC authority to seek compensation on behalf of employees who have been discriminated against and denied just compensation. While the Commission's limited resources would prohibit it from litigating every case involving an inadequate settlement payout, it could use strategic enforcement methods to encourage fair settlements.

E. *Sign of Things to Come?* *Senich v. American-Republican, Inc.*

The issue raised in this Note is not merely hypothetical. In fact, the arguments put forward by the EEOC in *Waffle House* indicate that the Commission believes that it has statutory authority to seek victim-specific relief, despite the existence of a private settlement agreement.²²³ In March 2003, the EEOC won its first victory on this issue in *Senich v. American-Republican*,

219. The limited resources available to the EEOC makes it necessary for the Commission to strategically choose the cases in which it resorts to litigation. Because it is in the public interest to have employers report their own potential illegal acts of discrimination, it is probably less likely that the EEOC would make an example of them by pursuing litigation. *National Enforcement Plan*, *supra* note 202, at para. II.C.

220. In deciding which cases to litigate, the EEOC looks at both "the issue raised and an assessment that the strength of the case supports the decision to proceed." *Id.* at para. II.E. Given these criteria, a case where an employee has accepted a low settlement offer for a discrimination claim will likely be considered stronger than a case where the employee has accepted fair compensation and therefore will be more likely to be targeted by the EEOC for litigation.

221. See Coolidge, *supra* note 208, at 2.

222. See *id.*

223. Seymour, *supra* note 5, at 7.

Inc.,²²⁴ which became the first case to extend *Waffle House* to waiver agreements.

In *Senich*, the EEOC attempted to amend its complaint in an ADEA suit to include five employees on whose behalf the Commission sought victim-specific relief. American-Republican objected to the complaint amendment because the employees previously signed a waiver of their right to sue in exchange for payments under a special severance program. The EEOC argued that the Court's holding in *Waffle House* applied to waivers and therefore gave the Commission "good cause" to amend its complaint. The court agreed with the EEOC and held that *Waffle House* did extend to instances where an employee has signed a waiver or release.²²⁵ It reasoned that the argument that the EEOC seeks only private benefits when seeking victim-specific relief was rejected by *Waffle House* and therefore the underlying justification for the limitation no longer existed. Absent this justification, the court found that "*Waffle House* can be read to end the limitation on the EEOC to seek victim-specific relief on behalf of employees who sign a waiver or release."²²⁶

CONCLUSION

Although *Waffle House* was decided in the context of mandatory arbitration, its scope should be interpreted much more broadly. *Waffle House* upholds the independence of the EEOC's cause of action. It asserts that an individual's actions in pursuance of his or her own interests do not take away the EEOC's duty to represent the public interest;²²⁷ and further, it tells us that the EEOC represents the public even when it seeks victim-specific relief on behalf of a private individual.²²⁸ These findings support the proposition that the EEOC should have the discretion to seek-victim specific relief, even on behalf of employees who have signed a settlement or waiver agreement. As *Waffle House* acknowledged, it is the EEOC, and not the court, that has the discretion to decide which discrimination cases to litigate and what remedies to seek.²²⁹ This discretion is not only mandated by the plain language of the statutes, but it is also central to the complex enforcement scheme created by Congress. To take away the EEOC's discretion would undermine the enforcement scheme and deny to the public the vindication promised to it by Congress. In short, because Title VII makes the EEOC "the master of its own case,"²³⁰ it should be permitted to seek and obtain victim-specific relief on behalf of employees who previously signed a settlement or waiver agreement.

224. 215 F.R.D. 40, 45-46 (D. Conn. 2003).

225. *Id.* at 46.

226. *Id.*

227. *See* EEOC. v. *Waffle House, Inc.*, 534 U.S. 279, 296 (2002).

228. *See id.*

229. *Id.* at 291-92.

230. *Id.* at 281.

BROWNFIELDS REMEDIATED? HOW THE BONA FIDE PROSPECTIVE PURCHASER EXEMPTION FROM CERCLA LIABILITY AND THE WINDFALL LIEN INHIBIT BROWNFIELD REDEVELOPMENT

FENTON D. STRICKLAND*

INTRODUCTION

Communities across the nation suffer from the negative impacts of abandoned, underused, and potentially contaminated properties called “brownfields.”¹ The term “brownfield” generally refers to “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”² According to a report prepared for the Environmental Protection Agency (EPA) in 2003 by Environmental Management Support, Inc., the number of brownfields in the United States ranges from 450,000 to 1,000,000.³ In the early 1990s, the U.S. Conference of Mayors labeled brownfields “one of the most critical problems facing U.S. [c]ities.”⁴

The appearance of abandoned properties in metropolitan areas may puzzle the typical uninformed resident. However, property developers, lending institutions, governments, lawyers, environmental agencies, and real estate professionals understand the primary reason for the condition. Developers are “hesitant to redevelop brownfields because of the investment risk and potential liability for cleanup costs.”⁵

This uncertainty, which causes apprehension for parties who might otherwise be inclined to redevelop brownfields, is a by-product of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).⁶ In recognition of the serious impact that the brownfield problem has had, as well as how uncertainty about liability has contributed to the problem, Congress, in 2002, enacted the Small Business Liability Relief and Brownfields Revitalization

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1. ENVTL. MGMT. SUPPORT, INC., U.S. ENVTL. PROT. AGENCY, REUSING LAND RESTORING HOPE: A REPORT TO STAKEHOLDERS FROM THE U.S. EPA BROWNFIELDS PROGRAM (2003) [hereinafter REUSINGLAND], available at http://www.epa.gov/swerosps/bf/news/stake_report.htm.

2. 42 U.S.C.A. § 9601(39) (West Supp. 2004).

3. REUSING LAND, *supra* note 1, at 7.

4. *Id.*

5. *Id.*

6. See generally Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C.A. §§ 9601-9675. The categories of parties liable for costs under CERCLA, as well as the operation of its liability provisions, are discussed in Part I of this Note.

Act (the "Brownfields Act" or the "Act").⁷ In its preamble, the Act asserts as its purpose "to amend CERCLA to promote the cleanup and reuse of brownfields."⁸ As a means to accomplish this objective, § 222(b) of the Act creates a "bona fide prospective purchaser (BFPP)" exemption from liability.⁹ Under the Act, a BFPP whose CERCLA liability derives from ownership or operation of a facility "shall not be liable as long as the [BFPP] does not impede the performance of a response action."¹⁰

Persons acquiring ownership of an affected facility after January 11, 2002 may qualify as BFPPs.¹¹ Section 222(a) of the Act establishes several other conditions for BFPP status, which potential buyers must establish by a preponderance of the evidence.¹² The establishment of these conditions, and the resultant qualification as a BFPP, afford a person immunity from liability.¹³ However, critical to the problem presented in this Note is the provision in § 222(b) of the Act, which says that "[i]f there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of [qualifying as a BFPP] . . . the United States shall have a lien on the facility."¹⁴ Therefore, a person might qualify for BFPP immunity under the Act, yet, at the same time, incur liability for the cleanup of the property. Section 222 conditions the government's authority to attach a lien on the property on whether the property's value increases as a result of the cleanup and on whether the government has unrecovered costs from the cleanup.¹⁵ The purpose of the lien provision is apparently to avoid a windfall to the property owner from the cleanup.¹⁶ Nevertheless, the inclusion of this "windfall lien" provision may compromise the Act's purpose of promoting the cleanup and reuse of brownfields.

7. Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2356 (codified as amended at 42 U.S.C.A. §§ 9601, 9604, 9605, 9607, and 9622) [hereinafter Brownfields Act].

8. *Id.* pmbl.

9. Brownfields Act 222(b), 42 U.S.C.A. § 9607(r)(1). The Brownfields Act includes provisions limiting liability for other types of parties, including an exemption for contiguous property owners in section 221, 42 U.S.C.A. § 9607(q), and clarification of the innocent landowner defense in section 223, 42 U.S.C.A. § 9607(b)(3). The bona fide prospective purchaser exemption shares many elements with the liability limitations for contiguous property owners and innocent landowners. This Note focuses on the bona fide prospective purchaser.

10. *Id.* § 9607(r)(1).

11. Brownfields Act § 222(a), 42 U.S.C.A. § 9601(40).

12. *Id.*; see *infra* note 49 and accompanying text.

13. See 42 U.S.C.A. § 9607(r)(1).

14. Brownfields Act § 222(b), 42 U.S.C.A. § 9607(r)(2).

15. See *id.* § 9607(r)(3).

16. Notably, the subsection authorizing the lien, § 9607(r), is titled "Prospective purchaser and windfall lien." Apparently, Congress considered the increase in property value a windfall to the property's owner where the owner was exempt from contributing to the government's reimbursement for its cleanup costs.

In addition to the windfall lien provision, the requirements for establishing BFPP status may inhibit the redevelopment of brownfields. This Note surveys the BFPP requirements, pausing to analyze three of the criteria that pose a particular threat to the accomplishment of the Act's goals. The Note also focuses on the windfall lien provision, illustrating how it too may impede effectuation of the Act's purpose, and suggesting certain challenges likely to be made against the provision. First, however, this Note discusses the key components of CERCLA and the 2002 brownfields amendment.

I. POTENTIALLY RESPONSIBLE PARTIES: LIABILITY AND DEFENSES UNDER CERCLA

Observing that the absence of careful planning and management in the disposal of solid and hazardous waste endangers human health and the environment, Congress sought to regulate such wastes from their generation to their disposal through the Resource Conservation and Recovery Act (RCRA).¹⁷ Unfortunately, before Congress had enacted RCRA, hazardous substances already had escaped into the environment, and, even with RCRA's control of the process and manifest intent to regulate wastes, it remained possible that hazardous substances would nevertheless find their way into the environment. As a result, Congress enacted CERCLA in 1980 to address the problem of hazardous waste contamination.¹⁸

Section 104(a) of CERCLA grants authority to the President to act in response to the release or threatened release of a hazardous substance from a facility into the environment.¹⁹ CERCLA defines the terms "release"²⁰ and "facility"²¹ broadly, and through reference to other statutes, it further defines "hazardous substances" to assume wide-ranging meanings as well.²² The statute, therefore, enables the government to respond to almost any situation where hazardous substances may have escaped into the environment.²³ Naturally,

17. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6922 (2000).

18. *See* CERCLA, 42 U.S.C.A. §§ 9601-9675 (West Supp. 2004).

19. *See* CERCLA § 104(a), 42 U.S.C.A. § 9604(a).

20. *See id.* § 9601(22) (defining "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment").

21. *See id.* § 9601(9) (defining "facility" as "(A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located").

22. *See id.* § 9601(14) (defining "hazardous substances" to include oil and associated pollutants and toxic pollutants regulated under the Clean Water Act, hazardous wastes regulated under RCRA, hazardous air pollutants regulated under the Clean Air Act, and imminently hazardous chemicals regulated under the Toxic Substances Control Act).

23. CERCLA does provide some exceptions to its broad definitions. *See, e.g., id.* § 9601(22) (excluding releases regulated under other environmental statutes, engine emissions from various

government cleanups of hazardous waste are expensive. In *B.F. Goodrich v. Betkoski*,²⁴ the Second Circuit observed that among CERCLA's purposes is the "assur[ance] that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions."²⁵ Section 107 provides that assurance by granting authority to the government to recover costs from responsible parties.²⁶

CERCLA imposes strict liability on four categories of potentially responsible parties.²⁷ The four categories include: "(1) the owner or operator of a vessel or a facility (current owners and operators); (2) [persons] who at the time of disposal of any hazardous substance owned or operated any facility at which [the substance was] disposed of" (past owners and operators); (3) persons who arranged for disposal, treatment, or transport for disposal or treatment, of hazardous substances (arrangers); and (4) persons who transported hazardous substances for disposal at sites selected by such persons (transporters).²⁸ Responsible parties from any category are also held jointly and severally liable for the costs of cleanup to the extent that they cannot prove divisibility of the harm done.²⁹

CERCLA's imposition of strict liability, and the broad categories of parties who may bear the liability, justify the wariness among prospective buyers to purchase and redevelop properties suspected of contamination. Once a person purchases such a property, the purchaser clearly fits into the section 107(a)(1) category of responsible parties, a "current owner." After the government has identified the person as a potentially responsible party, the government need only prove that there was a release or threatened release of hazardous substances from a facility causing the incurrence of response costs in order to impose strict liability on that party.³⁰ A current owner of a facility where a release of a hazardous substance has occurred may not raise as a defense that the current owner is not, in fact, responsible for the actual release. However, a court may make such a consideration in the current owner's later contribution action against other responsible parties under section 113.³¹

sources regulated through other statutes, releases of radioactive materials, and the normal application of fertilizer); *id.* § 9601(14) (providing certain oil and gas exclusions from "hazardous substance").

24. 99 F.3d 505 (2d Cir. 1996).

25. *Id.* at 514 (citing S. REP. NO. 96-848 at 13 (1980)).

26. CERCLA § 107, 42 U.S.C.A. § 9607(a).

27. *See id.*

28. *Id.*

29. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993).

30. *Id.* at 721.

31. *See* CERCLA § 113, 42 U.S.C.A. § 9613(f) (allowing a person to seek contribution from any other person who is liable or potentially liable under section 107(a)); *but see* *Farmland Indus., Inc. v. Colo. & E. R.R. Co.*, 944 F. Supp. 1492, 1501 (D. Colo. 1996) (allocating eighty-five to ninety percent liability for response costs to a current owner deemed not to be responsible for the release).

Section 107(b) creates the three available defenses to CERCLA liability: “(1) an act of God; (2) an act of war;” and (3) an act or omission of an unrelated (non-employee and non-contractual partner) third party.³² Under the third defense, the defendant must establish, by a preponderance of the evidence, that “he exercised due care with respect to the hazardous substance concerned . . . and . . . that he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.”³³ Courts consistently have construed these defenses narrowly to effectuate the statute’s broad purposes.³⁴

As a result, beyond concerns about current owner status and strict liability, a person contemplating the purchase of property known or suspected to be contaminated by a hazardous substance must further be mindful of the narrow scope of available defenses. Unfortunately, these considerations too often hamper the prospective purchaser’s decision to make the purchase of property, with the result that the property remains blighted and abandoned.

To be sure, CERCLA has induced beneficial outcomes by prompting actions to clean up contaminated properties. However, an ironic and undesirable side effect of the liability provisions of the Act is the creation of brownfields. Rather than buy property that will almost surely necessitate the cleanup of contamination and the imposition of liability, potential purchasers tend to develop cleaner properties outside urban areas.³⁵ This undesirable effect contributes to a condition that has been designated “urban sprawl.”³⁶ Congress has attempted to subdue the disincentive to purchase and develop brownfields, and the associated problem of urban sprawl, by enacting the Brownfields Act.³⁷ Specifically, Congress has provided the BFPP exemption.

II. THE BONA FIDE PROSPECTIVE PURCHASER EXEMPTION

Prior to the 2002 signing of the Brownfields Act, EPA had conceived policies in an effort to promote cleanup for the beneficial reuse and development of contaminated properties. In furtherance of these policies, EPA in 1995 initiated its formal Brownfields Program. The agency’s “investment—nearly \$700 million—in the Brownfields Program has leveraged \$5.09 billion in brownfields cleanup and redevelopment funding from the private and public sectors, and [has]

32. CERCLA § 107(b), 42 U.S.C.A. § 9607(b).

33. *Id.* § 9607(b)(3).

34. *See, e.g.,* Westwood Pharm., Inc. v. Nat’l Fuel Gas Distrib. Corp., 964 F.2d 85 (2d Cir. 1992); Reichhold Chems., Inc. v. Textron, Inc., 888 F. Supp. 1116 (N.D. Fla. 1995); United States v. Shell Oil Co., 841 F. Supp. 962 (C.D. Cal. 1993).

35. REUSING LAND, *supra* note 1.

36. *See id.* Environmental Management Support, Inc. described “sprawl” as the push by developers into outlying areas. The result is the development of lands better resembling their natural state, absent the common environmental problems of urban areas, if they were left undeveloped.

37. *See supra* note 7 and accompanying text.

helped to create more than 24,920 new jobs for citizens in brownfields communities."³⁸ Moreover, before the implementation of its formal program, EPA established the practice of entering into contracts with prospective purchasers to encourage the development of properties.³⁹ These contracts, appropriately styled "prospective purchaser agreements," shielded certain purchasers from the liability that would otherwise be imposed for the cleanup of contamination on their properties.⁴⁰

A. Immunity from Liability: From Prospective Purchaser Agreements to the BFPP Exemption

EPA's general policy has been that it will enter into an agreement, which will include a covenant not to sue, with a prospective purchaser if the person meets certain criteria.⁴¹ The criteria reflect "EPA's commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment."⁴² EPA further reserves the right to reject an offer from a prospective purchaser if it determines that entering into an agreement would not be in the public interest.⁴³ The creation of a prospective purchaser agreement requires the satisfaction of several conditions: (1) EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken; (2) EPA would receive a substantial benefit from the cleanup; (3) the continued operation or development of the facility would not aggravate or contribute to existing contamination nor interfere with a response action; (4) the continued operation or development of the property would not pose health risks to any person; and (5) the prospective purchaser must be financial viable.⁴⁴

A BFPP under the Brownfields Act will gain similar immunity from cleanup as that achieved by a party to a prospective purchaser agreement. The Act has in effect enabled developers to enjoy the benefits of a prospective purchaser agreement without having to enter into a formal contractual relationship with EPA. Further, the BFPP protection should be applicable to a more expansive category of properties,⁴⁵ because absent from the definition of a BFPP in section 222 is any requirement that the property be subject to an EPA action.⁴⁶ In fact, the Act's definition of "brownfield site" specifically excludes "a facility that is

38. REUSING LAND, *supra* note 1, at 5.

39. Announcement and Publication of Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (July 3, 1995).

40. *See id.*

41. *See id.* at 34,793.

42. *Id.*

43. *See id.*

44. *See id.* at 34,793-94.

45. Dale A. Guariglia et al., *The Small Business Liability and Brownfields Revitalization Act: Real Relief or Prolonged Pain?*, 32 ENVTL. L. REP. 10505 (2002).

46. *See* Brownfields Act § 222, 42 U.S.C.A. § 9601(40) (West Supp. 2004).

the subject of a planned or ongoing removal action.”⁴⁷ For these reasons, it would appear that the new exemption provides an attractive alternative to the prospective purchaser agreement. However, before prospective purchasers trade in the opportunity to enter into a prospective purchaser agreement in favor of BFPP status, they should consider the requirements for achieving such status.

B. Requirements for Obtaining BFPP Status

The BFPP exemption is available under the Act to persons who acquire ownership of a facility after January 11, 2002 and whose CERCLA liability would be based solely on the person's ownership or operation of the facility.⁴⁸ Further, upon discovery of contamination at the facility, the exemption requires that the BFPP not impede the performance of a response action and satisfy eight criteria by a preponderance of the evidence.⁴⁹ Specifically, a BFPP must establish that: (1) all disposal of hazardous substances occurred before acquisition of the facility; (2) the person made all appropriate inquiries into the previous ownership and uses of the facility; (3) the person provided legally required notices with respect to the discovery or release of any hazardous substances at the facility; (4) the person exercised appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substance; (5) the person provided full cooperation, assistance, and access to authorized persons conducting response actions; (6) the person complied with any applicable institutional controls; (7) the person complied with information requests; and (8) the person is not potentially liable, or affiliated with any person that is potentially liable, for response costs at the facility.⁵⁰

Whether the availability of the BFPP exemption contributes to the promotion of the redevelopment and reuse of brownfields will likely depend upon the ease with which purchasers can establish these eight requirements. Criteria 3, 5, 6, 7, and 8 are not complicated.⁵¹ In contrast, criteria 1, 2, and 4 are more confusing, necessitating EPA and judicial interpretation.

C. A Closer Look at Certain BFPP Criteria

Before the BFPP exemption operates with any certainty, prospective purchasers must evaluate how EPA and courts apply the first, second, and fourth requirements for obtaining it. The first criterion, that all disposal at the facility occurred before the person acquired it, is a familiar concept under CERCLA.⁵²

47. *Id.* § 9601(39)(B)(i).

48. *Id.* § 9607(r).

49. *Id.* § 9607(r).

50. *Id.* § 9601(40); Guariglia et al., *supra* note 45.

51. Guariglia et al., *supra* note 45 (referring to criteria 3, 5, 6, 7, and 8 for the BFPP exemption as “relatively straightforward”).

52. *See* 42 U.S.C.A. § 9607(a)(2) (identifying as a potentially responsible party persons who

Prospective purchasers may expect that courts will use past treatment of the concept in their evaluation of this criterion. Standards for the “all appropriate inquiries” requirement, the second BFPP criterion, have not yet been established.⁵³ Until EPA fulfills its mandate by promulgating regulations, purchasers will have to act with respect to this requirement in accordance with the limited guidance provided by the statute.⁵⁴ Finally, treatment of the “appropriate care” requirement under section 222(a)(40)(D) of the Act, the fourth criterion for exemption, is also uncertain. Before the Act, at least one of the statutory defenses to CERCLA liability required that a person prove “due care” with respect to hazardous substances.⁵⁵ Purchasers will have to decipher past standards of due care for immediate guidance as to what will constitute appropriate care for the BFPP exemption. A closer look at these three potentially cumbersome criteria follows below.

1. *Disposal of Criterion One: What Constitutes a Disposal?*—Under CERCLA section 107(a)(2), a person who owned or operated a facility at the time of disposal of a hazardous substance is a potentially responsible party.⁵⁶ In several CERCLA liability cases, past owners or operators have tried to prove that disposal occurred either before or after their ownership or operation in attempts to absolve themselves. In assessing these arguments, courts have evaluated the activities in which past owners were engaged when they owned or operated the facility, as well as the nature of the contamination, to determine whether disposal occurred at that time.⁵⁷ The courts will likely use the same factors to determine whether disposal occurred during a BFPP’s ownership or operation. Even if a person can prove that there was no addition of new hazardous substances during

at the time of disposal of a hazardous substance owned or operated a facility at which the substance was disposed of; proof that disposal occurred at a time other than during a person’s ownership or operation may release a person from this category of responsible parties).

53. See 42 U.S.C.A. § 9601(35)(B)(ii), requiring EPA to promulgate regulations establishing standards and practices for the purpose of satisfying “all appropriate inquiries” by January 11, 2004. As of April 20, 2005, EPA had not yet issued its final ruling concerning the regulations. By that date, the agency had formed a “Negotiated Rulemaking Committee on All Appropriate Inquiry” for the purpose of drafting its final ruling. Also, on August 26, 2004, EPA proposed a rule announcing federal standards and practices for conducting all appropriate inquiries, as required under 42 U.S.C.A. § 9601(35)(B)(ii). The proposed rule may be found at 69 Fed. Reg. 52542. EPA is currently considering comments to its proposed rule. Descriptions of the events from meetings of the committee and the status of the proposed rule may be observed at <http://www.epa.gov/swerosps/bf/regneg.htm>.

54. See *id.* § 9601(35)(B)(iv)(II) (describing certain requirements for inclusion in EPA’s future regulations).

55. *Id.* § 9607(b)(3) (requiring the exercise of due care with respect to hazardous substances for the raising of the third party defense).

56. See CERCLA § 107(a)(2), 42 U.S.C.A. § 9607(a)(2).

57. See *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1572 (11th Cir. 1996) (inferring from the activities of the defendant and the existence of certain contamination that the disposal could not have occurred while the defendant owned and operated the facility).

the person's ownership of a facility, obtaining BFPP status will require proof that no disposal occurred with regard to preexisting contamination as well.

Such proof will depend upon the courts' interpretation of "disposal." CERCLA defines disposal as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land . . . so that such . . . waste . . . may enter the environment."⁵⁸ Courts have interpreted this definition to include the dispersal of contaminated soil during excavation, grading, and other activities.⁵⁹ A purchaser of brownfield property will have to be mindful of this treatment of the term "disposal," especially when the purchaser engages in digging, excavating, grading, and construction, activities inherent in the redevelopment of an abandoned property.

Until recently, courts have also generally agreed that disposal could occur not only from active human conduct, such as digging and excavating, but also as a result of the "passive migration" of contamination through a property's soil.⁶⁰ "Passive migration" is a term describing the reposing of preexisting waste and its subsequent movement through the soil and other parts of the environment.⁶¹ Courts have traditionally cited the inclusion of the passive terms "spilling" and "leaking" in CERCLA's definition of disposal as justification for classifying passive migration as disposal.⁶² For example, in *Nurad, Inc. v. William E. Hooper & Sons Co.*, the Fourth Circuit remarked that some of the words in the definition of disposal, including "deposit," "injection," "dumping," and "placing," appear to be primarily of an active voice.⁶³ Nevertheless, the court went on to comment that other words in the definition "readily admit to a passive component: hazardous waste may leak or spill without any active human participation."⁶⁴ However, in *United States v. 150 Acres of Land*, the Sixth Circuit reasoned that "because 'disposal' is defined primarily in terms of active words . . . the potentially passive words 'spilling' and 'leaking' should be interpreted actively."⁶⁵ Other circuits also limit "disposal" to spills occurring by human intervention.⁶⁶

Prospective purchasers of brownfield properties will have to wait and see whether more circuits determine that passive migration is not a disposal under

58. 42 U.S.C.A. § 9601(29) (West Supp. 2004); 42 U.S.C. § 6903(3) (2000).

59. See, e.g., *Redwing*, 94 F.3d at 1494; *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988).

60. *United States v. 150 Acres of Land*, 204 F.3d 698, 705 (6th Cir. 2000); see also Michael S. Caplan, *Escaping CERCLA Liability: The Interim Owner Passive Migration Defense Gains Circuit Recognition*, 28 ENVTL. L. REP. 10121 (1998).

61. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992).

62. *Id.* at 846.

63. *Id.* at 845.

64. *Id.*

65. *150 Acres of Land*, 204 F.3d at 706.

66. See, e.g., *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351 (2d Cir. 1997); *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996).

CERCLA. A continued broader interpretation of “disposal” would likely compromise the usefulness of the BFPP exemption in the promotion of brownfield development, because prospective purchasers would be exposed to liability simply by developing the site—the whole goal of the Brownfields Act. Given the requirements for the exemption, in addition to proof that disposal occurred prior to ownership, a more narrow construction of “disposal” seems most appropriate. For example, the Act requires that the purchaser cooperate with the government by providing assistance and access to persons conducting response actions and complying with information requests.⁶⁷ This requirement implies that the purchaser and EPA would be engaged in a collaborative effort, each party having equal opportunity to detect and respond to leaking and spilling. Moreover, the Act provides that the person must exercise appropriate care with respect to hazardous substances by taking reasonable steps to stop any continuing release.⁶⁸ It would be unjust to deny a person BFPP status because passive migration beyond the control of a person taking reasonable steps occurred. Such a result seems appropriate for the traditional operation of CERCLA’s provisions,⁶⁹ but it appears hostile to the purpose of the Brownfields Act, the promotion of brownfield redevelopment.

2. *EPA Still Inquiring into What Will Satisfy Criterion Two: “All Appropriate Inquiries.”*—In addition to the requirement that the disposal of hazardous wastes occurred prior to the BFPP’s ownership of a facility, section 222(a) of the Act requires that the BFPP make “all appropriate inquiries into the previous ownership and uses of the facility.”⁷⁰ The Act required EPA, by January 11, 2004, to promulgate regulations establishing standards and practices for the purpose of satisfying this condition.⁷¹ As of the writing of this Note, EPA had not yet issued its final ruling promulgating such regulations.⁷² On August 26, 2004, EPA announced a proposed rule setting the standards and practices for all appropriate inquiries.⁷³ Until EPA promulgates its first rule, interim standards set forth in the Act will remain in effect.

67. See 42 U.S.C.A. § 9601(40)(E) (West Supp. 2004); *supra* note 50 and accompanying text.

68. See 42 U.S.C.A. § 9601(40)(D); *supra* note 50 and accompanying text.

69. See, e.g., *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) (“[The Court of Appeals] construe[s] CERCLA liberally to achieve these goals.”) (quoting *Kaiser Aluminum & Chem. Corp. v. Cattelus Dev. Corp.*, 976 F.2d 1338, 1340 (1992)); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 546 (6th Cir. 2001) (“CERCLA is to be liberally construed to serve its dual purposes.”); *Commander Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (“CERCLA must be construed liberally to effectuate its two primary goals.”) (quoting *BF. Goodrich v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992)); *Atlantic Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996) (“CERCLA . . . should be construed liberally to carry out its purpose.”).

70. Brownfields Act § 222(a), 42 U.S.C.A. § 9601(40)(B)(i).

71. *Id.* § 9601(35)(B)(ii).

72. See *supra* note 53.

73. See Standards and Practices for All Appropriate Inquiries, 69 Fed. Reg. 52542 (proposed Aug. 26, 2004) (to be codified at 40 C.F.R. pt. 312).

Standards and practices that EPA must include in its regulation include: (1) results of an inquiry by an environmental professional; (2) interviews with past and present owners; (3) reviews of historical sources, such as title documents; (4) searches for recorded environmental cleanup liens against the facility; (5) reviews of government records concerning contamination at or near the facility; (6) visual inspection of the facility; (7) specialized knowledge of the purchaser; (8) relationship of the purchase price to the value of the property if it were not contaminated; (9) commonly known information about the property; and (10) the degree of obviousness of contamination and the ability to detect it by appropriate investigation.⁷⁴ Section 223(2)(B) of the Brownfields Act lists similar interim standards a BFPP must follow until EPA has promulgated its regulation.⁷⁵ The Act further provides that, for property purchased on or after May 31, 1997, the purchaser must follow the procedures of the American Society for Testing and Materials (ASTM),⁷⁶ including the document known as "Standard E1527-97," entitled "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process," to satisfy the requirement in the appropriate inquiries clause.⁷⁷

The Act is silent regarding a purchaser's duty to do more to satisfy the "all appropriate inquiries" condition if the "Phase I" testing reveals contamination at the facility.⁷⁸ Presumably, because the Act requires the purchaser to exercise appropriate care with hazardous substances, such a Phase I revelation would require that the purchaser continue to test the property for contamination.⁷⁹ Nevertheless, until EPA comes out with its regulation, it will be left up to the potential BFPP to determine, with limited guidance from the interim standards, whether the degree of its inquiry complies with "generally accepted good commercial and customary standards and practices."⁸⁰

74. 42 U.S.C.A. § 9601(35)(B)(iii).

75. See Brownfields Act § 223(2)(B), 42 U.S.C.A. § 9601(35)(B)(iv)(I).

76. The ASTM procedures are regarded as the accepted industry standard for conducting Phase I environmental site assessments. Their purpose is to detect recognized environmental conditions. For a BFPP, these procedures would be followed in order to assess whether hazardous wastes exist on the property. Phase I would not include sampling and testing matter from the property.

77. 42 U.S.C.A. § 9601(35)(B)(iv)(II).

78. See Guariglia et al., *supra* note 45 (commenting that "if recognized environmental conditions are identified" during Phase I testing, a BFPP "may need to conduct Phase II investigation and sampling." A Phase I assessment is done for the limited purpose of identifying recognized environmental conditions. Phase II involves an evaluation of the condition in order to provide "sufficient information about the nature and extent of contamination").

79. See *id.*

80. See 42 U.S.C.A. § 9601(40)(B)(i) (providing that a BFPP make all appropriate inquiries into previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices).

3. *What Standard of Care Under Criterion Four Is Appropriate for the Availability of the Exemption to Be an Incentive for Brownfield Redevelopment?*—Under section 222(a) of the Brownfields Act, a person seeking the BFPP exemption must establish by a preponderance of the evidence that the person exercised “appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to—(i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”⁸¹ Prior to the Act’s promulgation, section 107(b)(3) of CERCLA provided that an otherwise responsible party would not bear CERCLA liability if the person established, by a preponderance of the evidence, that the release and damages resulting therefrom “were caused solely by—an act or omission of a third party” and “that (a) he exercised due care with respect to the hazardous substance . . . in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party.”⁸² Both provisions contemplate assessment of how the person has handled hazardous substances upon their discovery at the facility. Although the courts generally construe defenses to CERCLA liability narrowly,⁸³ defendants have not shied away from raising the section 107(b)(3) third-party defense. Review of the courts’ construction of the “due care” requirement may provide the best estimate of how a court may construe “appropriate care” under the BFPP provision in the future.

In *Idylwoods Associates v. Mader Capital, Inc.*,⁸⁴ property owners, upon discovering contamination, attempted to distance themselves from the property by ceasing to pay taxes on the site in the hope that county officials would foreclose on the property.⁸⁵ They also delayed providing a report to the county health department during a government agency’s investigation.⁸⁶ The court concluded that a property owner demonstrates due care with respect to a particular hazardous waste by taking all precautions a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.⁸⁷ The court noted that CERCLA liability may attach to the current owner of property on which there has been a response action, regardless of whether the current owner was actually responsible for the release of hazardous wastes, unless the owner can prove one of the section 107(b) affirmative defenses.⁸⁸ The defendant in *Idylwoods Association* could not successfully assert the section 107(b)(3) third party defense because of its failure to exercise due care

81. Brownfields Act § 222(a), 42 U.S.C.A. § 9601(40)(D).

82. CERCLA § 107(b)(3), 42 U.S.C.A. § 9607(b)(3).

83. See *supra* note 34 and accompanying text.

84. 956 F. Supp. 410 (W.D.N.Y. 1997).

85. *Id.* at 419.

86. *Id.*

87. *Id.* at 417.

88. *Id.* at 420.

with respect to the hazardous wastes.⁸⁹

In *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*,⁹⁰ the defendants purchased land previously used to manufacture wood products using a process that involved treating the wood with creosote and other wood preservatives.⁹¹ Significant amounts of preservatives remained on the site after the plant had ceased operations. In response to the State of Illinois's complaint, the defendants raised the third party defense successfully at the trial level.⁹² The Seventh Circuit reversed, holding that the defendants were not entitled to the defense.⁹³ The court reasoned that the defendants were aware of the preservatives on the site and had not made any attempt to take positive steps to reduce the threat the creosote posed.⁹⁴ The court added that the defendants had a "responsibility to take affirmative measures to control the pollution on the site."⁹⁵

The defendant in *State of New York v. Lashins Arcade Co.*⁹⁶ successfully raised the third party defense. In this case, after the defendant had received notice of a formal investigation into groundwater contamination on his property, he maintained a water filter, took water samples to be analyzed at a laboratory, instructed all of his tenants to avoid discharging any hazardous substances into the waste and septic systems, and conducted periodic inspections of the tenants' premises to ensure compliance with his instruction. The court affirmed summary judgment for the defendant, holding that he satisfied his obligation to exercise due care.⁹⁷ The *Lashins* defendant appears to have gone to great lengths to exercise due care, especially when compared to the defendants in *United States v. 150 Acres of Land*.⁹⁸ There, the defendant who raised a genuine issue regarding due care by doing nothing more than asking government authorities, after they inspected the defendants' property, to "advise them if anything needed to be done."⁹⁹ In the meantime, more than 550 drums containing ignitable waste sat unsupervised across the defendants' property.¹⁰⁰

The cases demonstrate that the inquiry into whether a defendant exercised due care is very fact-specific. The evidence necessary to prove the exercise of due care will vary among the courts. The uncertainty regarding the sufficiency of the facts necessary to establish "due care in light of all relevant facts and circumstances," coupled with the fact that courts generally construe section

89. *Id.*

90. 14 F.3d 321 (7th Cir. 1994).

91. *Id.* at 324.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 325.

96. 91 F.3d 353 (2d Cir. 1996).

97. *Id.* at 362.

98. 204 F.3d 698 (2000).

99. *Id.* at 706.

100. *Id.* at 702.

107(b) defenses narrowly,¹⁰¹ creates a potentially uneasy situation for defendants. Additionally, courts consistently construe the term “release” broadly,¹⁰² and they reliably hold that excavating and filling contaminated land will constitute a release.¹⁰³

Courts’ construction of the “due care” requirement in the context of the third party defense affords some guidance to prospective purchasers pursuing the BFPP exemption. Assuming that the courts will synchronize their constructions of “appropriate care” and “due care,” the determination whether a purchaser exercised appropriate care will involve a fact-specific inquiry that could vary from case to case. Uncertainty would result regarding fulfillment of the appropriate care requirement. If courts use the painstaking steps followed by the defendant in *Lashins* as the bar a BFPP must meet, the availability of the exemption loses some of its strength in effectuating the Act’s purpose.

If courts construe the “appropriate care to take reasonable steps” requirement as EPA recently suggested,¹⁰⁴ a purchaser may in fact be required, at the very least, to meet the *Lashins* standard. In a March 2003 memorandum, EPA Office of Site Remediation Enforcement indicated that because a BFPP has knowledge of the likely existence of contamination prior to purchase and thus has an opportunity to plan, the BFPP should have to take “greater ‘reasonable steps’” than an innocent landowner under section 107(b)(3).¹⁰⁵ Unfortunately, this guidance from EPA does not seem to be consistent with the purpose of the Act. If the Act requires a BFPP to take “greater reasonable steps” than a person asserting the third party defense, which was already limited in scope, it does not follow that the creation of the exemption would encourage brownfield redevelopment.

EPA might need to reconsider its plan for interpreting “appropriate care” if a heightened standard indeed discourages prospective purchasers from buying brownfields. As part of that consideration, EPA should look to the other

101. See *supra* note 34 and accompanying text.

102. See, e.g., *United States v. CDMG Realty Co.*, 96 F.3d 706, 715 (3d Cir. 1996) (holding that under CERCLA, “release” is broader than “dispose,” because it includes “leaching,” which is commonly used to describe migration of contaminants in landfills).

103. See, e.g., *K.C. 1986 Ltd. P’ship v. Reade Mfg.*, 33 F. Supp.2d 820, 832-33 (W.D. Mo. 1998) (holding that construction of wells increased the rate of contaminant migration and raised a genuine issue whether it caused a release); *Acme Printing Ink Co. v. Menard, Inc.*, 870 F. Supp. 1465, 1480 (E.D. Wis. 1994) (determining that excavation by current owner caused barrels of hazardous waste to rupture and, thus, owner’s role in the release of hazardous substances precluded assertion of innocent landowner defense).

104. Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, EPA, to Director, Office of Site Remediation and Restoration, Region I et al., at 13 (Mar. 6, 2003) (Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (“Common Elements”)), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

105. *Id.*

requirements of a BFPP.¹⁰⁶ In particular, EPA should consider the cooperative effort between the BFPP and EPA that the other criteria mandate.¹⁰⁷ The defendant asserting the section 107(b) third party defense must prove that it exercised due care with respect to hazardous substances during a time preceding any EPA involvement. On the other hand, a BFPP must prove that it exercised appropriate care while it provided full cooperation, assistance, and access to authorized federal and state officials who are conducting response actions.

Additionally, courts have based their determination whether a party exercised due care for the third party defense on whether the party alerted authorities to the presence of hazardous substances, cooperated with authorities in their clean-up efforts, and complied with information requests.¹⁰⁸ The bases of these courts' determination of due care now encompass several conditions a BFPP must establish, including the exercise of appropriate care.¹⁰⁹ This demonstrates how the eight conditions must interact. Thus, a heightened standard for appropriate care might translate into raised thresholds for satisfaction of the other BFPP criteria. Judicial scrutiny will determine whether such a result rests in harmony with Congress's intent in promulgating the Act.

In determining the standards for the requirements for the BFPP exemption, EPA and the courts must be mindful of the Brownfields Act's purpose of promoting the purchase, redevelopment, and reuse of brownfields. If uncertainty about the requirements, and the effort required to satisfy them, causes pursuit of the exemption to become an unattractive alternative to developing non-brownfield properties, EPA and courts will have to adjust their standards in order to carry out the Act's purpose. Congress's intent was to award the exemption to an innocent and cooperative party. Congress also intended to create an exemption that would provide an incentive for brownfield redevelopment. To provide this incentive, the level of innocence and cooperation required for the exemption must be an achievable bar.

III. THE WINDFALL LIEN

Once a person successfully satisfies the potentially onerous requirements for the BFPP exemption, the person's focus must turn to another provision in the Act. Section 222(b) authorizes the government to obtain a lien on the property if it is unable to recover all of its costs related to the cleanup.¹¹⁰ Consequently, in spite

106. See *supra* note 50 and accompanying text.

107. See *supra* notes 67-69 and accompanying text.

108. See, e.g., *Lashins*, 91 F.3d 353; *Idylwoods*, 956 F. Supp. 410; *supra* notes 82-87, 94-95 and accompanying text.

109. See 42 U.S.C.A. § 9601(40) (West Supp. 2004). The requirements that a BFPP provide notices with respect to the discovery of hazardous substances, provide full cooperation, assistance, and access, and comply with information requests are all separate criteria for the exemption. Courts have used similar criteria as factors for the determination of the use of due care for purposes of the third party defense.

110. See Brownfields Act § 222(b), 42 U.S.C.A. § 9607(r)(2).

of the careful work conducted by a BFPP in pursuit of such status, the BFPP might encounter a limitation on the exemption. Section 222(b) of the Brownfields Act states:

If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of [the BFPP exemption], and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility.¹¹¹

Paragraph (3) of this section lists the conditions to which the attachment of the lien is subject, requiring: (1) that a response action for which there are unrecovered costs to the United States be undertaken at the facility; and (2) that the response action increases the fair market value of the facility above that existing before the United States initiated the response action.¹¹² The lien would arise at the time at which the government first incurred costs with respect to a response action at the facility, and it would be for an amount equal to the lesser of the increase in fair market value or the unrecovered costs.¹¹³ Therefore, although the statute defines a BFPP as a person who is not liable under CERCLA,¹¹⁴ a BFPP may become liable nonetheless by virtue of the windfall lien.

By creating the windfall lien, Congress appears to have supplied the government with a safety net for the event that it would not be able to recover all of the costs of a particular response action. Remarkably, a party exempt from liability becomes that safety net, absorbing the unrecovered costs by operation of the lien. The attachment of the windfall lien could actually negate the BFPP exemption from CERCLA liability. The lien could even put a purchaser in a worse position than the purchaser would have been without the exemption.¹¹⁵ Moreover, the presence of the safety net may provide EPA with little incentive to aggressively pursue potentially responsible parties. An examination of these practical considerations surrounding the windfall lien provision follows a discussion of whether the operation of the provision could violate the due process clause of the Fifth Amendment.

A. Due Process Challenge to the Windfall Lien

The terms of the windfall lien provision immediately raise questions concerning its operation. First, section 222 excludes provisions for pre-

111. *Id.*

112. *See id.* § 9607(r)(3).

113. *See id.* § 9607(r)(4).

114. *See id.* § 9607(r)(1).

115. As discussed in Part II.A, *supra*, EPA's practice prior to the Brownfield Act was to enter into a prospective purchaser agreement with the purchaser. The agreement would include a covenant not to sue, which would protect the purchaser from future liability similar to that imposed by the windfall lien. In Part III.C, *infra*, the ordinary liability of a current owner under CERCLA is compared to that of a BFPP.

attachment notice and hearing. The section refers to CERCLA section 107(l)(3), which mandates that the government provide notice to all parties by filing its lien in the appropriate state office.¹¹⁶ However, nothing in the statute entitles a person whose property is subject to a lien to any further notice or a hearing. Whether the absence of such language arises to a violation of the property owner's constitutional right to due process may be left to judicial interpretation.¹¹⁷

The windfall lien provision also raises questions about how to determine a property's value both before and after the cleanup. A reasonable method for measuring the value of the property will be necessary to determine the increase in the property's value as a result of the cleanup, because the increase in the property's value governs the amount of the lien.¹¹⁸ Moreover, the duration of the lien is ambiguous. Section 222 provides that the lien shall continue until "the earlier of the satisfaction of the lien by sale or other means; or . . . recovery of all response costs incurred at the facility."¹¹⁹ The ambiguity lies in the potential duration of the lien if EPA has to litigate with other potentially responsible parties. Each of these ambiguities provides enough uncertainty surrounding the potential deprivation of a BFPP's property rights to cause concern for whether the lien provision is in accord with the Fifth Amendment.

Nearly all of CERCLA's significant provisions have been subject to constitutional challenges.¹²⁰ In general, the statute has been equal to the task. Courts have consistently held that CERCLA's liability scheme conforms to constitutional requirements.¹²¹ However, only the First Circuit, in *Reardon v. United States*,¹²² has had the opportunity to rule on the constitutionality of the imposition of a lien under CERCLA. That case involved the section 107(l) lien provision, which existed in the statute prior to the 2002 amendments.¹²³

Section 107(l) of CERCLA provides that the costs and damages for which a person is liable to the United States in a cost recovery action shall constitute a lien in favor of the United States.¹²⁴ The section further provides that the lien shall be upon "all real property and rights to such property which—(A) belong to such

116. See CERCLA § 107(l)(3), 42 U.S.C.A. § 9607(l)(3).

117. See U.S. CONST. amend. V (stating "no person shall be . . . deprived of life, liberty, or property without due process of law").

118. See 42 U.S.C.A. § 9607(r)(3)(B).

119. Brownfields Act § 222, 42 U.S.C.A. § 9607 (r)(4)(D).

120. See, e.g., *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 317 (2d Cir. 1986) (holding that CERCLA's authorization of EPA to order cleanup of a waste spill, as well as treble damages, did not constitute a taking of property in violation of the due process clause); *Continental Title Co. v. Peoples Gas Light & Coke Co.*, 959 F. Supp. 893, 901 (N.D. Ill. 1997) (finding that the CERCLA response cost recovery provision's unlimited degree of retroactivity does not violate due process); *United States v. Shell Oil Co.*, 841 F. Supp. 962, 974 (C.D. Cal. 1993) (concluding that imposition of liability under CERCLA does not constitute a taking).

121. See cases cited *supra* note 120.

122. 947 F.2d 1509 (1st Cir. 1991).

123. CERCLA § 107(l)(1), 42 U.S.C.A. § 9607(l)(1).

124. See *id.*

person; and (B) are subject to or affected by a removal or remedial action.”¹²⁵ Similar to the lien provision in the Brownfields Act, a lien under section 107(l) arises at the time the United States first incurs costs with respect to a response action, and the lien continues until the United States has collected reimbursement for the costs.¹²⁶

In *Reardon*, the First Circuit held that imposing a lien without notice or an opportunity for a pre-deprivation hearing violated the Due Process Clause of the Fifth Amendment.¹²⁷ About four years after EPA notified the property owners in *Reardon* that they might be liable for the costs of a CERCLA response action, the agency, without further notice to the owners, filed a lien against their property under section 107(l). The owners filed a declaratory relief action seeking to remove the lien. They argued that the lack of notice and an opportunity for a hearing prior to the lien’s attachment deprived them of due process. After a lengthy analysis, the court agreed.¹²⁸

The First Circuit began its analysis by determining whether a federal court, under CERCLA, had jurisdiction to hear the complaint. Federal courts do not have jurisdiction to hear challenges to removal or remedial actions before their conclusion.¹²⁹ The purpose of that CERCLA provision is to prevent forestalling response actions that may be important to human health and to the environment.¹³⁰ However, the court determined that hearing the landowners’ challenge did not present that type of hazard.¹³¹ In fact, the court concluded that the due process complaint was not a challenge to a particular removal or remedial action at all. Rather, it was an objection to CERCLA itself and the court had jurisdiction in spite of the prohibitive provision.¹³²

The *Reardon* court then turned to the substantive challenge to the CERCLA lien. In order to determine whether the enforcement of the lien violated the landowners’ right to due process, the court employed a two-part analysis announced by the United States Supreme Court in *Connecticut v. Doehr*.¹³³ At issue in that case was a Connecticut statute authorizing a judge to allow the prejudgment attachment of real estate, without prior notice or hearing, upon the plaintiff’s verification that there was probable cause to sustain the validity of the plaintiff’s claim.¹³⁴ The plaintiff in *Doehr* applied to a state court for such a lien on the defendant’s home in connection with an assault and battery claim he was seeking to institute against the defendant. The defendant did not learn of the attachment until after he received notice of his right to a post-attachment hearing.

125. *Id.*

126. *See id.*

127. *Reardon*, 947 F.2d at 1523-24.

128. *Id.*

129. 42 U.S.C. § 9613(h) (2000).

130. *Reardon*, 947 F.2d at 1514.

131. *Id.*

132. *Id.*

133. 501 U.S. 1 (1991).

134. *Id.* at 4-5.

Rather than pursuing the hearing, the defendant filed suit in federal court claiming that the statute violated the Fifth Amendment Due Process Clause. The court of appeals eventually concluded that the statute did not satisfy due process requirements, and the Supreme Court affirmed.¹³⁵

The analysis that *Doehr* followed asked two questions: (1) did the taking of a significant property interest occur; and (2) if so, what process is due under the circumstances?¹³⁶ The Supreme Court concluded that the property interests that the lien attachment effects are significant.¹³⁷ For a property owner, "attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default."¹³⁸ The Court added that the impairments to property rights that attachments and liens entail are "sufficient to merit due process protection."¹³⁹ Accordingly, the Court answered the question in step one of the analysis, whether a taking of a significant property interest occurred, in the affirmative.¹⁴⁰

For step two of the analysis, a determination of what process was due under the circumstances, the Court turned to a test first introduced in *Mathews v. Eldridge*.¹⁴¹ In *Mathews*, the Supreme Court balanced three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁴² In *Reardon*, the court admitted that the effects of the lien on the private interests of the property owner were not as great as a total deprivation of household goods or wages.¹⁴³ However, the court pointed out that the statute contemplates the filing of a notice of lien well in advance of the completion of cleanup procedures, with the result that the lien would be for an indefinite amount.¹⁴⁴ This would increase the lien's effect on the landowners' property interest, because other parties could not identify any limit on the government's interest in the property.¹⁴⁵

In addition to the considerable effect on private interests imposed by the CERCLA lien, the *Reardon* court identified a high risk of erroneous deprivation associated with the lien.¹⁴⁶ The court found no appreciable safeguards against the

135. *Id.* at 18.

136. *Id.* at 10-12.

137. *Id.* at 11.

138. *Id.*

139. *Id.*

140. *Id.*

141. 424 U.S. 319 (1976).

142. *Id.* at 335.

143. *Reardon*, 947 F.2d at 1518.

144. *Id.* at 1519.

145. *Id.*

146. *Id.* at 1519-20.

erroneous deprivation: "CERCLA provides no such safeguards. It provides for no pre-deprivation proceedings . . . [n]or does CERCLA provide for an immediate post-deprivation hearing."¹⁴⁷ Finally, with regard to the third prong of the *Mathews* balancing test, the court failed to detect that the government had any present, recognized interest in the property that would warrant procedures that might otherwise be suspect under a due process analysis.¹⁴⁸

The First Circuit, therefore, held in *Reardon* that "the deprivation caused by the CERCLA lien is significant," satisfying the first inquiry in the *Doehr* analysis.¹⁴⁹ Application of the *Mathews* test then revealed that the CERCLA lien procedures deprived the landowners of due process, because substantial private interests were at stake. The court held that the "lien statute completely lack[ed] procedural safeguards, [and] that the government [had] no pre-existing interest in the property."¹⁵⁰ The CERCLA lien provisions, "by not providing, at the very least, notice and a pre-deprivation hearing to a property owner [who has raised a colorable defense], violate[d] the fifth amendment due process clause."¹⁵¹

The *Reardon* holding departed from precedent that had been established by a myriad of constitutional challenges to CERCLA.¹⁵² Some have commented that the divergence was necessitated by "the unique nature of the interests affected by the lien and the lien's immediate and irreparable harm."¹⁵³ The circuit court's ruling is acceptable because "[m]ost fundamental to the due process analysis are the . . . findings that pre-enforcement review will not frustrate CERCLA's purpose and will prevent irreparable harm to the [property owner]."¹⁵⁴

Congress has not responded to the ruling in *Reardon*, nor have other courts had the occasion to follow the First Circuit's lead. In *United States v. 150 Acres of Land*,¹⁵⁵ the Sixth Circuit held that the CERCLA lien did not violate a property owner's Fifth Amendment due process rights.¹⁵⁶ However, in that case, the government provided notice to the owner of its intent to perfect the lien, and the government gave the owner an opportunity for a hearing before EPA Regional Judicial Officer. The court, applying the *Doehr* analysis, concluded that these measures were adequate safeguards against erroneous deprivation.¹⁵⁷

The First and Sixth Circuits reached different conclusions concerning the constitutionality of the CERCLA lien. However, the facts in the two cases differed in one important respect. In *Reardon*, the absence of notice and a

147. *Id.* at 1519.

148. *Id.* at 1521.

149. *Id.* at 1523.

150. *Id.*

151. *Id.* at 1523-24.

152. See generally cases cited *supra* note 120.

153. Cheryl Kessler Clark, *Due Process and the Environmental Lien: The Need for Legislative Reform*, 20 B.C. ENVTL. AFF. L. REV. 203, 216 (1993).

154. *Id.* at 219.

155. 204 F.3d 698, 710 (6th Cir. 2000).

156. *Id.*

157. *Id.* at 711.

predeprivation hearing led the court to conclude that the lien provision violated the Fifth Amendment Due Process Clause.¹⁵⁸ In *150 Acres of Land*, on the other hand, notice and an opportunity for a hearing provided adequate safeguards against an erroneous deprivation of property interests.¹⁵⁹ In each case, the opportunity for notice and a predeprivation hearing was a determining factor in the due process inquiry.

The terms of the windfall lien in the Brownfields Act closely resemble those in section 107(l).¹⁶⁰ The two sections each announce that the lien attaches when the government has first incurred costs in a response action. Therefore, the windfall lien shares the indefiniteness in the value of the lien that troubled the First Circuit in its examination of the original CERCLA lien.¹⁶¹ Most notably, neither provision provides for a pre-deprivation hearing, the existence of which was the determining factor for the two circuits addressing the due process issue.¹⁶²

The two lien sections do differ in their respective triggers. Under section 107(l)(i) of CERCLA, liability for response costs activates the attachment of a lien against the person's property.¹⁶³ The windfall lien of the Brownfields Act, on the other hand, is not a product of a person's liability. The lien attaches to property belonging to a person who has obtained immunity from CERCLA liability, a BFPP. Section 222(b) of the Act, instead, initiates the government's lien when the cleanup results in unrecovered costs from other parties and the property's value increases.¹⁶⁴ Undeniably, if due process requires a pre-deprivation hearing for a party who is liable to the government, then the same should hold true for a person technically free of any liability.

Pre-deprivation hearings for CERCLA liens do not interfere with CERCLA's purposes.¹⁶⁵ In contrast, the absence of this key ingredient of due process in windfall lien situations would frustrate the purposes of the Brownfields Act. The specter of the windfall lien provision may in itself discourage the use of the BFPP exemption, let alone its application without adequate procedural safeguards.

B. Attachment of the Windfall Lien May Negate the BFPP Liability Exemption

Whether or not the lien provision passes constitutional muster, the uncertainty that accompanies it may remain a cause for concern among potential BFPPs.

158. *Reardon*, 947 F.2d at 1523-24. See *supra* note 151 and accompanying text.

159. *150 Acres of Land*, 204 F.3d at 711. See *supra* note 157 and accompanying text.

160. See 42 U.S.C.A. § 9607(e)(3) (West Supp. 2004) and 42 U.S.C. § 9607(l) (2000) for descriptions of the original CERCLA lien provisions, and 42 U.S.C.A. § 9607(r) (West Supp. 2004) for the Brownfields Act's windfall lien provision.

161. *Reardon*, 947 F.2d at 1519. In *Reardon*, the court pointed to the fact that the lien attaches well in advance of the completion of a cleanup action. This, according to the court, aggravated the effect the lien had on the property owner's property rights.

162. See *Reardon*, 947 F.2d at 1519; *150 Acres of Land*, 209 F.3d at 710.

163. CERCLA § 107(l)(1), 42 U.S.C.A. § 9607(l)(1) (West Supp. 2004).

164. See Brownfields Act § 222(b), 42 U.S.C.A. § 9607(r)(3).

165. See Clark, *supra* note 153, at 219.

Doubts about the operation of the provision may discourage these persons from pursuing the exemption and the redevelopment of brownfields altogether. The BFPP exemption loses credence where a BFPP may nonetheless have to pay for a cleanup by satisfaction of the lien.

As the *Reardon* court pointed out, the negative impacts of a CERCLA lien are immense.¹⁶⁶ The court explained that a lien "clouds title; impairs the ability to sell or otherwise alienate property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default."¹⁶⁷ These consequences of a lien describe a BFPP's actual liability for a response action, despite the Brownfield Act's portrayal of a BFPP as a person unencumbered by CERCLA liability.¹⁶⁸

A BFPP's actual CERCLA liability essentially disguises itself in several parts of the Act. For instance, a person must first satisfy cumbersome, and sometimes vague, criteria to obtain the status of a BFPP, a process accompanied by appreciable costs.¹⁶⁹ The "all appropriate inquiries" requirement in section 222(a) is an example; it requires a person to interview environmental professionals and past and present owners, review title documents, search for recorded environmental cleanup liens against the facility, review government records concerning contamination at or near the facility, and visually inspect the facility.¹⁷⁰ At the same time, the BFPP must take reasonable steps to control any contamination found at the facility.¹⁷¹ Moreover, if the government elects to exercise its statutory right to attach a lien on the BFPP's property, the BFPP suffers the negative impacts associated with the cloud on the property's title. In such a case where the government has made that election, the BFPP would ultimately be liable for satisfaction of the value of the lien. Therefore, a BFPP's exemption from liability does not arrive free of costs.

The justification for the inclusion of the lien in the Act is that it avoids a windfall to the BFPP, while allowing the government to recoup its otherwise unrecovered response costs.¹⁷² The government must have assurance that it can recover its costs if CERCLA's laudable purpose to protect the public health through the cleanup of hazardous wastes is to be realized. CERCLA's ambition has been to ensure that those parties responsible for contamination pay for the cleanup.¹⁷³ A BFPP, whose effort in disproving responsibility for contamination earns an exemption from liability, plainly cannot be a party from whom recovery of CERCLA costs would further the statute's purposes.

A BFPP's incurrence of liability for the costs consequential to a cleanup

166. *Reardon*, 947 F.2d at 1518-19.

167. *Id.*

168. 42 U.S.C.A. § 9607(r)(1) ("A [BFPP] . . . shall not be liable.").

169. See 42 U.S.C.A. § 9601(40). See discussion *supra* Part II (describing in detail the efforts required for satisfaction of the BFPP).

170. See 42 U.S.C.A. § 9601(40)(B).

171. See *id.* § 9601(40)(D).

172. *Id.* § 9607(r)(2).

173. *BF Goodrich v. Betkoski*, 99 F.3d 505, 515 (2d Cir. 1996).

action, cloaked in the attachment of a windfall lien, does not advance CERCLA's objective to recover costs from responsible parties. In addition, the potential liability on the part of a BFPP could thwart the aim of the Brownfields Act itself. An unattractive exemption is not likely to promote brownfield redevelopment, and thus, the price of the exemption may outweigh its benefits.

*C. Equitable Considerations Point Away from the Imposition
of the Windfall Lien*

The test whether the consequences of the BFPP exemption are more destructive than beneficial is further demonstrated by a comparison of the BFPP, whose property is encumbered by the windfall lien, and an ordinary property owner found liable to the government in a cost recovery action. As discussed, the BFPP incurs great costs in obtaining the exemption. The BFPP suffers additional costs from the effects of the lien on the property and from the satisfaction of the lien by payment to the government for its value. The nonexempt property owner, on the other hand, is liable to the government for the sum of the judgment, which can include the government's entire cleanup costs, a figure that often reaches several million dollars.

However, under section 113(f)(1) of CERCLA, the nonexempt property owner may seek contribution from other potentially responsible parties.¹⁷⁴ That section proclaims, "any person may seek contribution from any other person who is liable or potentially liable under [section 107(a)], during or following any civil action under [section 106] or under [section 107(a)]."¹⁷⁵ Section 113(f)(1) requires that the plaintiff in a contribution action prove that the person from whom contribution is sought is liable under section 107(a).¹⁷⁶ In order to make such proof, the plaintiff must establish: (1) that the defendant falls within one of the four categories of potentially responsible parties; (2) that the site is a "facility," as defined by CERCLA; (3) that there has been a release of threatened release at the facility; and (4) that the plaintiff incurred necessary response costs.¹⁷⁷ Element number four appears to bar a BFPP from filing a claim for contribution from potentially responsible parties for the value of a windfall lien, because the BFPP, by definition, is exempt from liability for response costs.¹⁷⁸ This is an unfortunate consequence to a BFPP. The contribution action confers

174. CERCLA § 113(f)(1), 42 U.S.C.A. § 9613(f)(1).

175. *Id.*

176. *See id.*

177. *See id.* § 9607(a).

178. The fourth element a plaintiff in a contribution action must prove to satisfy section 107(a), which is necessary to satisfy the elements of section 113(f), is that the plaintiff incurred necessary response costs. 42 U.S.C.A. § 9607(a). A BFPP has obtained an exemption from liability for response costs. 42 U.S.C.A. § 9607(r)(1). It follows that the BFPP would be barred from a claim for contribution for not having "incurred necessary response costs." A court would have to characterize the imposition of a windfall lien as the incurrence of response costs for a BFPP to sidestep this prohibition against its right to contribution.

on a nonexempt property owner a handsome opportunity to reduce its liability.

With regard to a claim for contribution by a liable party, section 113(f)(1) provides that “[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”¹⁷⁹ Courts often employ the “Gore factors” to determine an appropriate allocation of costs.¹⁸⁰ Courts, in their own discretion, often consider several of the factors, a few, or even only one, depending upon the totality of the circumstances.¹⁸¹ The Gore factors include:

- (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of hazardous waste can be distinguished;
- (2) the amount of hazardous waste involved;
- (3) the degree of toxicity of the hazardous waste;
- (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of hazardous waste;
- (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent harm to the public health or the environment.¹⁸²

When the Gore factors work in an otherwise liable party’s favor, courts often allocate little or even no liability to the party.¹⁸³ If a BFPP were allowed to seek contribution from other parties, it would stand to reason that consideration of the Gore factors would favor the BFPP. For example, for a person to qualify as a BFPP, all disposal of hazardous waste must have occurred prior to the person’s acquisition of the property.¹⁸⁴ Therefore, Gore factor four would benefit the BFPP, because the person would not have been involved in the generation, transportation, treatment, storage, or disposal of hazardous wastes. Furthermore, factor five compels a consideration of the degree of care a person exercised with respect to the hazardous wastes. Certainly a BFPP’s efforts in exercising appropriate care would demonstrate that the BFPP seized the spirit of this equitable factor as well.¹⁸⁵ And, finally, a BFPP must behave with unlimited cooperation with respect to government officials involved in a response action.

179. CERCLA § 113(f)(1), 42 U.S.C.A. § 9613(f)(1).

180. *Env’tl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992).

181. *Id.*

182. *Alliedsignal, Inc. v. Amcast Int’l Corp.*, 177 F. Supp. 2d 713, 746-47 (S.D. Ohio 2001).

183. *See, e.g., Farmland Indus., Inc. v. Colo. & E. R.R. Co.*, 944 F. Supp. 1492, 1501 (D. Col. 1996) (allocating eighty-five to ninety percent of costs); *Alcan-Toyo Am., Inc. v. N. Ill. Gas Co.*, 881 F. Supp. 342, 347 (N.D. Ill. 1995) (requiring site owner to bear ten percent of response costs). *See also* cases where no share of response costs were allocated to certain parties, including *Gopher Oil Co. v. Union Oil Co. of California*, 955 F.2d 519 (8th Cir. 1992); *City of Toledo v. Beazer Materials & Services, Inc.*, 923 F. Supp. 1013 (N.D. Ohio 1996).

184. 42 U.S.C.A. § 9601(40)(A) (West Supp. 2004).

185. *See id.* § 9601(40)(D) (requiring that a BFPP exercise appropriate care with respect to hazardous substances).

Therefore, Gore factor number six, too, would work to the BFPP's advantage.

Attachment of a windfall lien to a BFPP's property would potentially cause the person to incur a greater liability than the person would have had without the exemption. Congress did not have this result in mind when it created the exemption. The Gore factor analysis reveals that Congress had a relatively innocent party in mind for the BFPP exemption. However, the inclusion of the windfall lien may more than offset the reward of exemption for such innocence.

D. Additional Liability from EPA Use of the Safety Net

In recognition of the fact that the opportunity to seek contribution from other parties may not be available to a BFPP, prospective purchasers may wish to shun pursuit of the exemption altogether. Even if a BFPP were allowed to seek contribution in a section 113(f) action, the provision in section 113(f)(2) could work to the BFPP's detriment.¹⁸⁶ There, the statute says, "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."¹⁸⁷ Therefore, a party who has settled with EPA for its CERCLA liability may not be the subject of a contribution claim.

EPA has broad authority under CERCLA to enter into settlements with potentially responsible parties. Under section 122(a), EPA may enter into agreements with any potentially responsible party regarding cleanup responsibilities and liability.¹⁸⁸ Whenever EPA enters into an agreement with a party, the Attorney General is responsible for approving it, and the agreement is entered into the district court as a consent decree.¹⁸⁹ Before the court enters its final judgment, and after the proposed judgment is filed with the court, section 122(d)(2) requires the Attorney General to provide an opportunity to persons not named to the settlement to comment on the proposed judgment.¹⁹⁰ The Attorney General may then withhold consent to the proposed judgment if the comments disclose facts or considerations that indicate that the judgment would be inappropriate, improper, or inadequate.¹⁹¹

The United States Court of Appeals for the Third Circuit described in *In re Tutu Water Wells CERCLA Litigation* that "CERCLA favors fair and efficient settlements through consent decrees" by its section 122 provisions.¹⁹² The court indicated that parties are not obligated to participate in settlement negotiations, but "non-settling defendants may bear disproportionate liability for their acts."¹⁹³

186. *See id.* § 9613(f)(2).

187. *Id.*

188. CERCLA § 122(a), 42 U.S.C.A. § 9622(a).

189. *See id.* § 9622(d)(1)(A).

190. *See id.* § 9622(d)(2).

191. *See id.* § 9622(d)(2)(B).

192. *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 209 (3d Cir. 2003).

193. *Id.* at 208 (citing *United States v. Occidental Chem.*, 200 F.3d 143, 150 n.8 (3d Cir.

Describing CERCLA's encouragement of efficient settlements, the court went on to say that "it makes sense for the government . . . to give a [potentially responsible party] a discount on its maximum potential liability as an incentive to settle . . . [T]hose who are slow to settle ought to bear the risk of paying more."¹⁹⁴

Therefore, CERCLA encourages settlements, and lenient settlements with willing parties quick to the negotiation table are not disfavored under the statute nor by the courts. Additionally, nothing in the Brownfields Act discourages EPA from settling under CERCLA for low dollar amounts with other persons. The absence of any such provision in the Brownfields Act could bring about such an unfortunate circumstance, with EPA utilizing the windfall lien as a safety net for its unrecovered costs.¹⁹⁵ However, EPA's ability to settle with potentially responsible parties is not unchecked. A court will approve a consent decree if the settlement is "fair, reasonable, and consistent with CERCLA's goals."¹⁹⁶ A court's evaluation of the fairness of a consent decree involves an assessment of both procedural and substantive considerations.¹⁹⁷ The Third Circuit has said of those considerations:

Procedural fairness requires that settlement negotiations take place at arm's length. A court should look to the negotiation process and attempt to gauge its candor, openness and bargaining balance. Substantive fairness requires that the terms of the consent decree are based on 'comparative fault' and apportion liability according to rational estimates of the harm each party has caused. As long as the measure of comparative fault on which the settlement terms are based is not arbitrary, capricious, and devoid of a rational basis, the district court should uphold it.¹⁹⁸

The Third Circuit in *In re Tutu Water Wells* articulated an "arbitrary and capricious" standard for evaluating the fairness of an EPA-negotiated settlement.¹⁹⁹ Therefore, a court gives deference to the terms of a settlement agreement where EPA has been a party. In an earlier case, the First Circuit announced the same deferential standard when it stated, "where . . . a government actor committed to the protection of the public interest has pulled the laboring oar

1999)).

194. *Id.* (citing *United States v. SEPTA*, 235 F.3d 817, 824-25 (3d Cir. 2000)).

195. The value of the windfall lien is limited to the lesser of the increase in the property's value as a result of the cleanup or the government's unrecovered costs. 42 U.S.C.A. § 9607(r)(4)(A) (West Supp. 2004). However, in a case where the increase in value is great, EPA could settle low with potentially responsible parties and yet recover its costs by operation of the windfall lien.

196. *Tutu Water Wells*, 326 F.3d at 207.

197. *Id.*

198. *Id.* (citations omitted).

199. *Id.*

in constructing the proposed settlement," there is a need for judicial deference.²⁰⁰

The encouragement for potentially responsible parties to settle their CERCLA liability with EPA, along with the agency's broad discretion in entering into settlements, makes it simple to contemplate a situation where EPA settles with potentially responsible parties and leaves a greater portion for the windfall lien on a BFPP's property. In effect, the settling parties, and not the BFPP, ends up with a windfall. This represents another result of the windfall lien provision that could undermine the purpose of the Brownfields Act. In order to effectuate the Act's purpose, courts will need to consider EPA's usage of the windfall lien safety net when evaluating settlement agreements under section 122.

CONCLUSION

The effect of CERCLA has been to clean up hazardous waste contamination and to cause those parties responsible for it to bear the costs. Necessarily, in order to accomplish its important purposes, the statute has been construed broadly, and defenses available to its liability provisions have been limited in scope. As a result, would-be purchasers, wary of the liability that could ensue from the purchase of potentially contaminated properties, have avoided these properties altogether. The unfortunate side effect has been the formation of brownfields.

Congress intended to suppress this effect by providing for a BFPP exemption from CERCLA liability in the Brownfields Act. The exemption is meant to promote the redevelopment of brownfields. However, the uncertainty surrounding its difficult requirements may make the exemption too unattractive for it to work in furtherance of the Act's purpose. If courts and EPA really wish to promote brownfield redevelopment, interpretation of the exemption's requirements must be made in favor of potential purchasers.

In particular, the requirement that all disposal at a facility occurred prior to a BFPP's ownership should be interpreted in such a way as to allow the BFPP to actually redevelop the property without worry that redevelopment activities may result in further disposal of preexistent disposed waste. This would require some change in the way "disposal" has been interpreted in CERCLA cases. Because the BFPP requirements demand a cooperative effort between the property owner and EPA, the BFPP may deserve more lenient treatment. A BFPP must prove appropriate care with respect to hazardous substances while giving full cooperation to officials responding to a cleanup. Building and excavation activities on a property could disturb preexistent contamination despite such care and cooperation. If the disturbance were construed as a "disposal," spoiling the exemption, the exemption is sure to lose its effectiveness.

EPA must also issue its final ruling defining the standards and practices for the all-appropriate inquiries requirement for BFPP status in order to put potential purchasers on notice of the precise requirement. Further, EPA and courts cannot hold a BFPP to a heightened standard for appropriate care regarding hazardous

200. *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990).

substances. To do so would not only undermine the Act's purpose, but it would ignore the overall tendency of the exemption's requirements to contemplate a cooperative effort between the purchaser and EPA. Successful assertion of the third-party defense to CERCLA liability has included the requirement that the property owner exercised due care with respect to hazardous substances. A showing of due care has required that the property owner alerted officials of contamination and took reasonable steps in light of previous ownership of the property. A BFPP must do the same while complying with specific information requests from officials and providing full cooperation, assistance, and access to authorized persons conducting response actions.

Even if strenuous requirements for the exemption do not discourage its widespread usage, and ultimately the realization of the Act's purpose, the existence of the windfall lien provision may have that effect. By attempting to avoid providing a windfall to BFPPs whose property increased in value as the result of government cleanup, Congress may have actually negated the BFPP liability exemption altogether. After *Reardon*, the lien provision may not be constitutionally stable because of its lack of provision for a pre-deprivation hearing. Constitutional due process issues notwithstanding, the provision may provide disincentive for brownfield redevelopment by causing an otherwise immune BFPP to incur CERCLA liability. Without the exemption, a liable property owner performing all of the steps necessary to gain that immunity would find favorable treatment when a court made its equitable considerations in a contribution action against other potentially liable parties. A BFPP may find itself in a worse position than it would have been without the exemption. This becomes more evident considering EPA's potential for settling low with responsible parties, recouping more costs from the BFPP. Unless Congress revisits the brownfields problem soon to address these issues with the BFPP exemption, courts and EPA will have to interpret and apply the Act in a way to promote its purpose. Otherwise, the brownfields problem may continue to become aggravated.

DIRECTORS' LIABILITY FOR CORPORATE MISMANAGEMENT OF 401(K) PLANS: ACHIEVING THE GOALS OF ERISA IN EFFECTUATING RETIREMENT SECURITY

KIMBERLY LYNN WEISS*

INTRODUCTION

Enron employees, who lost most of their retirement savings when Enron stock plummeted from \$80 to .40 cents per share,¹ unfortunately are not alone. The recent explosion in 401(k) class action litigation has produced several corporate defendants who are similarly situated to Enron, including Global Crossing, WorldCom, Williams Cos., Rite-Aid, Lucent, Xerox, EDS, Duke Power, Qwest, McKesson, Bristol Myers, AOL Time Warner, Provident Financial,² IPALCO,³ and Kmart.⁴ Lenette Crumpler, a fifty-one-year-old single mother from Rochester, New York, lost everything in her 401(k) account—\$86,000—when Global Crossing stock collapsed early in 2002.⁵ Marjorie Young, an employee at Indianapolis Power & Light Company (IPALCO) lost the \$200,000 that she had saved in her thirty-seven years at IPALCO after it merged with AES Corporation and the shares fell by nearly ninety-seven percent.⁶ The eighty-two year-old IPALCO mailroom worker could not even afford to replace the windows in her drafty old house.⁷ At the same time that IPALCO employees lost \$95.4 million in their 401(k) plans in 2001, fourteen key officers and directors sold more than \$22 million of their company stock just months before the stock price dramatically fell. As the officers and directors were selling their stock, they were simultaneously urging plan

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1. Rob Norton, *What if Your Company's 401(k) Plan Lays an Egg?*, CORPORATE BOARD MEMBER, Nov.-Dec. 2003, available at http://www.boardmember.com/issues/archive.pl?article_id=11727.

2. Evan Miller, *Current Issues in Employee Benefits Litigation*, 697 PLI/LIT 825, 828 (2003).

3. Chris O'Malley, *Stock Sale: IPALCO Chiefs Defend Selling Stock Shares Before Merger*, INDIANAPOLIS STAR, Dec. 1, 2002, at A01.

4. Gary Haber, *Former Kmart Executives Want Judge to Drop Suit over the Retailer's Finances*, DETROIT FREE PRESS, July 1, 2003, available at 2003 WL 56852233.

5. Jeff Manning, *The 401(k) Problem*, PORTLAND OREGONIAN, Dec. 1, 2002, at E01, available at 2002 WL 3985590. However, companies do not have to fail for employees to lose their retirement savings in 401(k) plans that are heavily invested in employer company stock. Lucent Technologies, Qwest Communications International, and Tyco International, for example, avoided bankruptcy, while employees still lost a majority of their retirement savings when the company's stock dramatically fell. *Id.*

6. O'Malley, *supra* note 3, at A01.

7. *Id.*

participants and beneficiaries to hold IPALCO stock to exchange for AES shares.⁸ Sadly, Crumpler's and Young's stories are not atypical, and thousands of other employees have found themselves in similar positions.

The Employee Retirement Income Security Act of 1974 ("ERISA"),⁹ the federal statute covering 401(k) plans,¹⁰ was established to protect the benefits of employees, such as the those at Global Crossing and IPALCO. ERISA is meant to protect those employees from abuse by employers, or those acting on the employer's behalf, by regulating fiduciaries' conduct and making them personally liable for breaches of fiduciary duty.¹¹ This Note focuses on the ERISA fiduciary duties owed by directors to employees as a result of directors' involvement in the management and administration of 401(k) plans. Under ERISA, in addition to officers and plan committee members, directors have a fiduciary duty to manage the investment process of their company's 401(k) plan prudently and solely in the interest of the plan participants.¹² In order to avoid liability for the mismanagement of plan assets, directors must be aware of what their fiduciary obligations entail. Unfortunately, neither ERISA nor the courts have clearly outlined director's fiduciary duties with regard to 401(k) plans. Therefore, a portion of this Note is devoted to outlining situations where directors have been found in violation of their fiduciary duties, thus providing directors with a better understanding of their responsibilities. By understanding their responsibilities, directors can help prevent plan losses in the first instance, thereby shielding themselves from liability.

As litigation over 401(k) plan losses increases in the future, it is even more crucial that directors understand their fiduciary obligations under ERISA. The number of fiduciary lawsuits against directors in companies offering a 401(k) plan will likely increase for several reasons: (1) the increased use of such plans by employers as retirement security,¹³ (2) the lack of diversification and heavy

8. *Id.*

9. 29 U.S.C. §§ 1001-1169 (2000).

10. ERISA is the primary body of federal law that provides for the protection of employee benefit rights. Martha L. Hutzelman, *Fiduciary Liability of Employers Sponsoring Pension Plans*, SH020 ALI-ABA 307, 309 (2002).

11. Jerald I. Ancel, *Counsel for Debtors Beware!*, AM. BANKR. INST. J., July-Aug. 2001, at 8 (2001).

12. *Martin v. Harline*, 15 Employee Benefits Cas. 1138, No. 87-NC-115J, 1992 U.S. Dist. LEXIS 8778, at *26-34 (D.C. Utah Mar. 30, 1992).

13. Companies are increasingly moving from guaranteed pension plans, which are in the category of defined benefit plans, to uninsured employee-managed 401(k) plans, which are in the category of defined contribution plans. O'Malley, *supra* note 3, at A01; see also EMPLOYEE BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, DOES 401(K) INTRODUCTION AFFECT DEFINED BENEFIT PLANS? (n.d.), available at <http://www.dol.gov/ebsa/publications/papkepensionreport.html> (last visited Apr. 17, 2005). Defined contribution plans have increasingly become popular among employers, and from 1979 to 1998 they have more than doubled from 331,432 to 673,626, as reported by the Congressional Research Service in July 2002. In the same years, the number of defined benefit plans declined from 139,489 to 56,405. Manning, *supra* note 5, at E01. Currently,

investment in employer stock options for 401(k) plans,¹⁴ (3) the recent economic downturn, and (4) the high media exposure of recent accounting scandals negatively affecting 401(k) plans.¹⁵ Consequently, given that a fiduciary who breaches his ERISA duties is *personally* liable to make good any losses to the plan resulting from his breach of fiduciary duty¹⁶ and given that the average cost of merely defending a fiduciary claim was estimated to be \$124,000 in 2000,¹⁷ directors must take extra precautions to help ensure that they do not become subject to such lawsuits in the future.

Unfortunately, too many directors underestimate their role as fiduciaries in 401(k) plans. Although many directors do not realize this, ERISA's fiduciary

forty-seven million Americans are saving for retirement in 401(k) plans. Penelope Wang, *Is Your 401(k) Safe? What the Fund Scandal Means for Your Retirement?*, MONEY, Jan. 1, 2004, at 72, available at 2004 WL 55037553. The definitions of defined benefit plans and defined contribution and their distinctions are further outlined in Part I of this Note. See *infra* Part I.

14. ERISA does not forbid investment of 401(k) plan assets in employer securities. Susan J. Stabile, *Pension Plan Investments in Employer Securities: More Is Not Always Better*, 15 YALE J. ON REG. 61, 64 (1998). In fact, in 401(k) plans, employees may invest up to 100% of their assets in employer securities if the plan document allows, as well as hold a substantial percentage of an employer's outstanding securities. *Id.* at 68. For example, in January 2001, Enron employees had approximately sixty percent of 401(k) funds invest in company stock, a third of which was company matched with restrictions on diversification. *The Enron Collapse and Its Implications for Worker Retirement Security: Hearings Before the House Comm. on Education and the Workforce*, 107th Cong. 112 (2002) (statement of Mikie Rath, Benefits Manager, Enron Corporation), available at <http://benefitslink.com/articles/enronretirementsecurityhearing20020207.pdf>. In 1996, according to Access Research Inc., a financial services consulting firm, nearly a quarter of the \$675 billion in 401(k) plans was invested in employer securities. Ellen E. Schultz, *Frittered Away: Some Workers Find Retirement Nest Eggs Full of Strange Assets*, WALL ST. J., JUNE 5, 1996, at A1, available at 1996 WL-WSJ 3105461.

15. Jeffrey D. Mamorsky & Terry L. Moore, Greenberg Traurig LLP, *Fiduciary Audit Insurance: Risk Management for Post-Enron ERISA Compliance*, GT ALERT, June 2002, at 2, available at http://www.gtlaw.com/pub/alerts/2002/mamorskyj_06a.asp; see also *supra* notes 1-5. Merely examining Enron's 401(k) plan losses alone, which were about \$1.3 billion, illustrates the seriousness attributable to the recent 401(k) scandals. Manning, *supra* note 5, at E01.

16. 29 U.S.C. § 1109(a) (2000).

17. *ERISA Suits Spark Liability Concerns*, FIN. EXECUTIVE, June 1, 2004, at 57, available at 2004 WLNR 14766919. In addition to defense costs, the average indemnity payment per claim in 2000 was \$1.2 million, up from \$900,000 in 1999. *Id.* Although in larger corporations, directors are sometimes protected against personal liability through their company's indemnity or through fiduciary liability insurance, *id.*, protection often is limited to a certain dollar amount. See *infra* notes 20-23. And even if directors are wholly protected against personal liability, they nonetheless have a significant interest in avoiding such lawsuits, which can be devastating to their corporation's finances, reputation, and overall well-being, in addition to time-consuming and embarrassing for the directors, who may be displaced from the company as a result of their negligence and/or misconduct.

obligations are among the "highest known to the law."¹⁸ For example, although the directors and officers in Enron were not directly involved in the management or administration of Enron's defined contribution plans, they are still subject to liability under ERISA for any breach resulting from their discretionary control over the plan investments.¹⁹ If Enron's directors lose this legal battle, they will be subject to personal liability in an amount that will almost assuredly exceed the eighty-five million dollars they have in fiduciary liability insurance coverage given the fact that plan losses exceed one billion dollars.²⁰ In fact, eighteen former Enron directors have already agreed to pay \$168 million to settle a lawsuit brought by investors for alleging not adequately overseeing the company.²¹ Ten directors will be contributing \$13 million of their own money, thereby agreeing to personal payouts to shareholders.²² The Enron settlement followed the WorldCom settlement where directors named in a class-action shareholder lawsuit for similar allegations agreed to pay \$18 million of their own money.²³ Accordingly, for obvious reasons, directors must educate themselves about the numerous ways they can be subject to liability under ERISA and take the necessary precautionary measures to avoid liability by careful planning, management, and oversight.

Currently, the liability of corporate directors surrounding mismanagement of 401(k) plans is anything but clear. However, with the increase in high-profile cases, the set of legal precedents produced as a result of these cases will likely better define company obligations to employees, providing directors with a much better roadmap to follow when dealing with 401(k) plans. In light of the recent events, it is expected that courts will more vigorously scrutinize directors' ERISA fiduciary duties, holding the board accountable for their involvement, even if their involvement is limited to appointment of plan administrators (those who actually manage the plan assets).

However, before the courts take drastic measures to hold board members

18. See *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000).

19. John D. Hughes & Jason M. Rodriguez, *Securities and ERISA Suits—A Fatal Combination*, in NATIONAL UNDERWRITER PROPERTY & CASUALTY-RISK & BENEFITS MANAGEMENT, Nov. 21, 2003, available at 2003 WL 69821726. The plaintiffs alleged that Enron directors and officers breached their fiduciary duties by failing to adequately monitor and oversee plan administrators, by issuing deceptive public statements about the company's financial condition, and by encouraging employees to continue to invest in company stock when the directors and officers knew or should have known that such an investment was imprudent. *Id.*

20. Jeff Manning, *401(k) Lawsuits Might Aid Reform*, CHI. TRIB., Dec. 31, 2002, at 5, available at 2002 WL 104502170; Jim Hopkins, *Firms May Boost 401(k) Insurance*, USA TODAY, Jan. 28, 2002, available at <http://www.usatoday.com/money/energy/2002-01-29-enron-insurance.htm>; see also Lawrence, *infra* note 216.

21. Matt Krantz & Greg Farrell, *Ex-Enron Officials OK \$168M Payment*, USATODAY.COM, Jan. 10, 2005, available at http://www.usatoday.com/money/industries/energy/2005-01-10-enron-usat_x.htm.

22. *Id.*

23. *Id.*

personally liable for plan losses, they should take a step back and analyze the cases in light of the competing congressional purposes and public policy interests behind ERISA. There is obviously a very strong public interest in maintaining the security of America's retirement system, as evidenced by congressional intent in the establishment of ERISA.²⁴ The court in *Hollingshead v. Burford Equipment Co.*²⁵ outlined this congressional intent: "[T]his statute was passed with the overwhelming purpose of protecting the legitimate expectations harbored by millions of employees of a measure of retirement security at the end of many years of dedicated service."²⁶ However, equally important in protecting retirement security, the courts must not make the burdens so tenuous on employers that they no longer have an incentive to provide 401(k) plans,²⁷ a phenomenon that has already occurred with defined benefit plans.²⁸

24. As retirement plans rapidly began to increase in the 1970s, Congress, noting the rapid growth in such plans, set out to "assur[e] the equitable character of [employee benefit plans] and their financial soundness." *Cent. States, Southeast & Southwest Areas Pension Fund v. Cent. Transport, Inc.*, 472 U.S. 559, 570 (1985) (quoting ERISA statute) (alterations in original); ERISA of 1974, Pub. L. No. 93-406, § 2, 88 Stat. 829, 829 (outlining the goal of ERISA as to promote retirement security).

25. 747 F. Supp. 1421 (M.D. Ala. 1990).

26. *Id.* at 1443 (quoting *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 155 (D.C. Cir. 1984)).

27. Employers are not required to establish employee benefit plans; rather, such plans are completely voluntary. However, if an employer chooses to offer the plans, it must abide by ERISA. *See In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 757 (S.D.N.Y. 2003). The decline of 401(k) plans would create disastrous results for the American people with respect to their retirement security. For many investors, 401(k) plans, or other types of defined contribution plans, make up their entire financial retirement plan outside of their home equity. Wang, *supra* note 13, at 72. In fact, according to the Federal Reserve, \$2.2 trillion was invested in the defined contribution system in 1998. *401(k) Day an Occasion for 55 Million Americans to Celebrate*, PSCA.ORG, June 17, 1999, at <http://www.psc.org/press/p1999/june17.html>.

28. The reason that defined benefit plans (guaranteed pension plans) have taken a back seat to defined contribution plans (401(k) plans) is because ERISA placed too high administrative and regulatory costs on defined benefit plans. *See supra* text accompanying note 13; Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71, 85 (2002); *see generally* Eugene P. Schulstad, Note, *ERISA Disclosure Decisions: A Pyrrhic Victory for Disclosure Advocates*, 34 IND. L. REV. 501 (2001). When ERISA was enacted in 1974, 401(k) plans did not exist. The retirement plans offered by employers were guaranteed pension plans, Lorraine Schmall, *Defined Contribution Plans After Enron*, 41 BRANDEIS L.J. 891, 899 (2003), and Congress's intent with ERISA was to increase the overall number of retirement plans and the number of employees entitled to receive employee retirement benefits. However, instead "the combined burdens placed on employers by the passage of ERISA and subsequent court decisions have caused considerable tension between the needs of businesses and the desires of [guaranteed pension] plan participants." Schulstad, *supra*, at 501. Thus, in light of the recent upsurge in 401(k) litigation, courts must be careful not to follow the same pattern with directors' liability for 401(k) plans.

The court in *Varity Corp. v. Howe*,²⁹ recognized these competing interests:

[C]ourts may have to take account of competing congressional purposes [when interpreting ERISA fiduciary duties], such as Congress' desire to offer employees enhanced protection for their benefits . . . and . . . its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.³⁰

Essentially, Americans will only realize the protections underlying ERISA if the interests of plan participants and directors/employers can be adequately balanced so that the ultimate goal of ERISA enforcement is realized—to provide retirement security.

Although courts need to provide the necessary incentives for directors to effectively carry out their obligations as ERISA fiduciaries with regard to 401(k) plans, they must not do so in a way that places too heavy a burden on directors. Thus, the courts should hold directors liable only for mismanagement of plan assets for which they could have prevented through careful review of plan investment decisions, particularly the procedures followed in determining plan options. This is not a standard where directors are required to reevaluate decisions made by competent plan administrators, but rather, a standard where directors are required to review and oversee investment decisions, keeping their eyes open for possible breaches of fiduciary duties, such as conflicts of interests. In effect, directors should only be found liable if they were on notice of fiduciary violations, or would have been on notice had they been properly carrying out their duties of oversight. Holding directors liable for abuses of plan assets that they could have prevented only by exacting investigation will place too high administrative and litigation costs upon companies. However, it is equally important to provide incentives for directors to correctly manage 401(k) plan assets so that employees are left with adequate retirement security. Therefore, courts should strictly enforce ERISA obligations by holding directors personally liable for plan losses if they fail to adequately monitor plan assets by careful review.

Part I of this Note provides a basic understanding of 401(k) plans. Part II provides a general understanding of the fiduciary duties under ERISA and how fiduciary status is determined. Part III specifically outlines the general fiduciary status of a director and further outlines the various situations in which a director is likely to be held liable with respect to 401(k) losses. The particular situations outlined in Part III include: exercising de facto control over investment options, appointing and monitoring responsibilities, and misrepresenting or omitting information regarding 401(k) investments. Part IV offers advice for directors to reduce their potential liability by complying with 404(c) regulations, various other procedures, and obtaining fiduciary liability insurance. Finally, the Note concludes by analyzing the potential conflict between the competing interests of

29. 516 U.S. 489 (1996).

30. *Id.* at 497.

imposing ERISA fiduciary obligations on directors and ensuring that employers continue to establish and offer 401(k) plans.

I. BRIEF INTRODUCTION TO UNDERSTANDING 401(K) PLANS

Two broad categories of retirement plans which ERISA recognizes are defined benefit plans and defined contribution plans.³¹ Unlike defined benefit plans, defined contribution plans are not guaranteed³² and instead shift investment risks squarely onto the shoulders of participants, regardless of their investing know-how.³³ The most common type of defined contribution plan is a 401(k) plan, which allows employees to put a part of their salaries into a retirement account that is tax-deductible.³⁴ Under such plans, the employees' earnings are only taxed when the employee retires or otherwise withdraws money from the account.³⁵ Employers can choose to contribute to the account, which they often do by using employer stock as the matching contribution.³⁶ These plans allow employees to direct the investment of their account balances by choosing among the investment options offered by the employer.³⁷ Thus, in a defined contribution plan, employees are not promised a specified pension benefit, but rather, benefits are determined by the value of the investment when the employee takes money out of the plan.

Another popular type of defined contribution plan that is very similar to a 401(k) plan and which often is used in conjunction with a 401(k) plan, is the employer stock ownership plan (ESOP).³⁸ An ESOP is an individual account

31. Stabile, *supra* note 14, at 66 (ERISA recognizes these two broad categories within 29 U.S.C. § 1002(34)-(35) (2000)).

32. Under a defined benefit plan, a company promises and guarantees cash pension benefits after the employee works a specified amount of time based on a pre-determined formula. 29 U.S.C. § 1002(35) (2000). Pension plans are also federally guaranteed by the Pension Benefit Guarantee Corporation (PBGC). Schmall, *supra* note 28, at 901. Because the employer is managing the funds and determining how it is invested, the breadth of legal obligations under such plans are significantly greater. *Id.* at 897.

33. Manning, *supra* note 20, at 5. Other types of defined contribution plans include: 401(a), 403(b), 457, KEOGH, Simplified Employee Pension (SEP), Individual Retirement Account (IRA), and SIMPLE Plan. For further information on the above plans, see Northwestern Mutual Financial Network, *Types of Defined Contribution Plans*, at http://www.nmfn.com/tn/learnctr--articles--page_types_defn_cont (last revised Dec. 2003).

34. Schmall, *supra* note 28, at 894. 401(k) plans were first introduced in a 1978 amendment to the Internal Revenue code (IRC) § 401(k) in order to allow employees to put a portion of their earnings away for retirement and to allow employers to make contributions, without having to pay taxes on the savings. *Id.* at 899. The law did not go into effect until January 1, 1980. *Id.* at 900.

35. *Id.* at 894.

36. *Id.*

37. Stabile, *supra* note 14, at 66.

38. *Id.*

pension plan that is designed to invest primarily in employer securities.³⁹ An employer who establishes an ESOP contributes either stock or cash to the plan, which is then used by the ESOP trustee to purchase shares.⁴⁰ Many companies will combine an ESOP with a 401(k) plan using stock contributions to match the 401(k),⁴¹ and, consequently, fiduciary obligations of both 401(k) plans and ESOPs are often similarly analyzed, as illustrated within the text of this Note.⁴²

II. BRIEF INTRODUCTION TO UNDERSTANDING ERISA

A. General Fiduciary Duties Under ERISA

Under ERISA, a fiduciary is one who owes duties to the plan participants and beneficiaries, and thus, must exercise care, skill, prudence, and diligence in fulfilling those duties.⁴³ The fiduciary obligations under ERISA are similar to that of a trustee of a trust or an executor of an estate,⁴⁴ except that the legislative history and case law indicate that the ERISA standard is intended to be more stringent.⁴⁵ An ERISA fiduciary owes both a duty of loyalty and a duty of care to the plan and must discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries.⁴⁶ Accordingly, a fiduciary under a plan is prohibited from dealing with the assets of a plan in his own interest or for his own account.⁴⁷ Furthermore, a fiduciary with respect to a plan shall not “in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interest of the plan or the interests of its participants.”⁴⁸

The fiduciary must also act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”⁴⁹ This standard is not of a “prudent lay

39. See I.R.C. § 409(a)(2) (2004).

40. Stabile, *supra* note 14, at 66.

41. The National Center for Employee Ownership, *401(k) Plans and ESOPs* (2002), at <http://www.nceo.org/library/401k.html> (last visited Apr. 17, 2005).

42. See *In re Ikon Office Solutions Sec. Litig.*, 191 F.R.D. 457, 462 n.5 (E.D. Pa. 2000) (suggesting that courts will examine fiduciary duties under a 401(k) plan in the same way as an ESOP plan); see also *infra* note 124.

43. 29 U.S.C. § 1104(a)(1)(A) (2000).

44. Ancel, *supra* note 11, at 8.

45. See *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983); see also Stabile, *supra* note 14, at 71.

46. 29 U.S.C. § 1104(a)(1).

47. *Id.* § 1106(b)(1).

48. 29 U.S.C. § 1106(b)(2).

49. *Id.* § 1104(a)(1)(B). This latter duty applies to the overall management of the plan and its assets. The central fiduciary duties found in ERISA section 404 are as follows:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interests of

person” but rather of a “prudent fiduciary with experience” and thus, if the fiduciary does not have the knowledge and expertise needed to make a prudent decision, he has a duty to obtain independent advice.⁵⁰ This is an objective standard focusing on the conduct of the particular fiduciary and consequently “a pure heart and an empty head are not enough.”⁵¹ The test for prudence focuses on whether the fiduciaries, at the time they engage in a transaction, have “employed the appropriate methods to investigate the merits of the investment and to structure the investment.”⁵² Thus, whether or not the investment was prudent in hindsight is not what counts; rather, the question is whether the investment was prudent at the time it was made.

The duties under ERISA also apply to inaction taken by a fiduciary who is aware of, or should be aware of, another person’s breach. The fiduciary will be liable if he (1) knowingly conceals the breach, (2) fails to act prudently and in the interests of the plan participants and beneficiaries in carrying out his own duties, thereby enabling the other fiduciary to breach his duty, or (3) discovers the breach, but fails to exercise reasonable efforts to remedy it.⁵³ Although courts have generally required that fiduciaries follow adequate procedures for investigating decisions affecting the plan by examining the conduct by the person who made the decision, they are not necessarily required to reevaluate the merits themselves.⁵⁴

the participants and beneficiaries and

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter. . . .

Id. § 1104(a)(1)(A)-(D); *but see id.* § 1104(a)(2) (providing that “in the case of an eligible individual account plan, . . . the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by the acquisition and holding of . . . qualifying employer securities”).

50. *Howard v. Shay*, 100 F.3d 1484, 1490 (9th Cir. 1996).

51. *See Keach v. U.S. Trust Co.*, 240 F. Supp. 2d 840, 845 (C.D. Ill. 2002) (quoting *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983)).

52. *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983).

53. 29 U.S.C. § 1105(a).

54. *See H.R. REP. NO. 93-533*, at 312-12 (1974), *reprinted in* 1974 U.S.C.A.N. 4639, 4650-51; *Cunningham*, 716 F.2d at 1467; *Mazzola*, 716 F.2d at 1232-33; *Arakelian v. Nat’l W. Life*

If a fiduciary breaches his duty under ERISA, he is personally and individually liable to make good to the plan any losses resulting from his breach of fiduciary duty.⁵⁵ Co-fiduciaries who have knowledge of, knowingly participate in, or enable the commitment of a breach of duty by another fiduciary are jointly and severally liable with the breaching fiduciary.⁵⁶ In addition to financial liability, the court can award a full range of equitable remedies to the plaintiffs to correct past abuses and to deter future misconduct.⁵⁷

B. Determining Fiduciary Status Under ERISA

The first issue that must be addressed in any ERISA lawsuit is whether or not the defendants are acting as fiduciaries under the plan.⁵⁸ A person can become a fiduciary under ERISA in three ways: (1) being named as the fiduciary in the instrument establishing the plan;⁵⁹ (2) being named as a fiduciary pursuant to a procedure specified in the plan instrument, e.g., being appointed an investment manager who has fiduciary duties toward the plan;⁶⁰ or (3) falling under the statutory definition of fiduciary.⁶¹ A person is a fiduciary under the statutory definition to the extent:

- (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such

Ins. Co., 680 F. Supp. 400, 405-06 (D.D.C. 1987).

55. 29 U.S.C. § 1109(a).

56. *Id.* § 1105(a).

57. *Id.* § 1132(a)(5). Furthermore, courts have held that these remedies are not precluded by other federal statutes. For example, there may be instances when ERISA claims and securities-fraud claims, which are governed by the Private Securities Litigation Reform Act (PSLRA), overlap. In *Vivien v. Worldcom, Inc.*, No. C 02-01329 WHA, 2002 WL 31640557 (N.D. Cal. July 26, 2002), the court held that it could not dismiss an ERISA claim simply because recovery under ERISA overlaps with recovery under PSLRA. The conflict between ERISA and federal securities law is further discussed in Part III.B.3, *infra*.

58. *Hull v. Policy Mgmt. Sys. Corp.*, No. CIV.A.3:00-778-17, 2001 WL 1836286, at *4 (D.S.C. Feb. 9, 2001).

59. 29 U.S.C. § 1102(a); *see also* *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1179 (3rd Cir. 1996); *Keach v. U.S. Trust Co.*, 240 F. Supp. 2d 840, 843 (C.D. Ill. 2002).

60. 29 U.S.C. § 1102(a)(2); *see also* *Glaziers & Glassworkers*, 93 F.3d at 1179; *Keach*, 240 F. Supp. 2d at 843.

61. 29 U.S.C. § 1002(21)(A); *see also* *Glaziers & Glassworkers*, 93 F.3d at 1179; *Keach*, 240 F. Supp. 2d at 843.

plan.⁶²

Consequently, under the above definitions, an individual may be a fiduciary with respect to some of his actions, but not others, and therefore will only be subject to liability for those portions of a plan over which he exercises discretion or control.⁶³

Effectively, a fiduciary is either someone who is designated as a fiduciary or administrator (“named fiduciary”) either directly under the plan document or by way of a procedure outlined in the plan, such as through appointment,⁶⁴ or someone who undertakes a fiduciary function, but who has not been named in the plan document or appointed to carry out that function (“functional fiduciaries”).⁶⁵ Fiduciary status is fairly straight forward when someone is a named fiduciary, for example, when dealing with a plan administrator.⁶⁶ As defined by ERISA, the term “administrator” is the person designated by the terms of the plan document, and if no administrator is named, then the administrator is the person acting as the plan sponsor, such as the employer.⁶⁷ The ERISA plan administrator is always a fiduciary, and thus can be made personally liable for plan losses to the extent that he has authority to act, and either acts negligently or fails to act when doing so would be prudent.⁶⁸ Furthermore, the plan documents can also designate persons as fiduciaries for specific purposes.⁶⁹ For example, a plan committee member can be designated for the purpose of overseeing investment strategies and thus will have fiduciary obligations with respect to those responsibilities.⁷⁰

62. 29 U.S.C. § 1002(21)(A).

63. *Hull*, 2001 WL 1836286, at *4 (addressing only the issue of whether the defendants breached their fiduciary duties with respect to the portions of the plan for which they exercised discretionary control); see *Crowley ex rel. Corning, Inc. Inv. Plan v. Corning, Inc.*, 234 F. Supp. 2d 222, 229 (W.D.N.Y. 2002); *Schultz v. Texaco, Inc.*, 127 F. Supp. 2d 443, 451-52 (S.D.N.Y. 2001).

64. A “named fiduciary” is one “who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary . . . by a person who is an employer or employee organization,” by an employer and employee organization acting jointly with respect to the plan. 29 U.S.C. § 1102(a)(2).

65. Fred Reish & Joe Faucher, *Who Are the Investment Fiduciaries for a 401(k) Plan?* (Part 1), J. PENSION BENEFITS, Autumn 2000, available at http://www.reish.com/publications/article_detail.cfm?ARTICLEID=272.

66. Fred Reish & Debra Davis, Reish Luftman Reicher & Cohen, *The DOL's Enron Brief: What It Means for 401(k) Investments*, Apr. 2003, at http://www.reish.com/publications/article_detail.cfm?ARTICLEID=393.

67. 29 U.S.C. § 1002(16)(A).

68. C. Frederick Reish & Joseph C. Faucher, Reish Luftman Reicher & Cohen, *What's in a Name?—Director and Officer Liability Under ERISA*, July 1998, at http://www.reish.com/publications/article_detail.cfm?ARTICLEID=39.

69. *Id.*

70. *Id.*

III. ERISA AS IT APPLIES TO DIRECTORS' INVOLVEMENT WITH 401(K) PLANS

A. General Fiduciary Status of a Director

ERISA expressly contemplates that an officer, employee, or other representative of a company may serve as a fiduciary of a plan.⁷¹ In a typical situation, the board of directors (or the employer, if not a corporation) will establish an ERISA plan and is therefore the initial fiduciary.⁷² In some cases the employer, board members, or officers retain some or all the management and administrative duties outlined in the plan document, in which case they will have fiduciary duties with respect to those responsibilities.⁷³ Directors who are named fiduciaries under the plan document, or are appointed by procedures in the plan, should be aware that they have fiduciary duties and should be on notice as to what those fiduciary duties entail. For example, in *In re McKesson HBOC, Inc. ERISA Litigation*,⁷⁴ the court found that because the plan document provided that the Compensation Committee had responsibility for determining the investment policy of the plan, and since the Committee was comprised of the Board of Directors, all directors were proper defendants for breach of fiduciary duty claims involving 401(k) plan losses.⁷⁵

Nevertheless, the more typical, but more complex, situation is where a director is not a named fiduciary, but rather a functional fiduciary.⁷⁶ Unfortunately, liability regarding breach of fiduciary liability by a functional fiduciary is more ambiguous than that of a named fiduciary since such a determination is based on actual authority or power demonstrated instead of formal title and duties.⁷⁷ Usually, as functional fiduciaries, directors appoint individuals or committees to be responsible for choosing investment options and managing and administering the plan,⁷⁸ and are not themselves responsible for the

71. 29 U.S.C. § 1108(c)(3).

72. *Fiduciary Responsibility for 401(k) Plans*, BENEFIT INSIGHTS, June 2002, at http://www.jdb401k.com/bulletins/bi2002_06.htm.

73. *Id.*

74. No. C00-20030, 2002 WL 31431588 (N.D. Cal. Sept. 30, 2002).

75. *Id.* at *10.

76. *See Rankin v. Rots*, 278 F. Supp. 2d 853, 871 (E.D. Mich. 2003) (holding that the defendants' argument that they were not fiduciaries because they were not named as the Plan Administrator "misses the mark." Since the complaint alleged that the directors exercised discretionary authority with respect to the Plan, if proven, the directors would be ERISA fiduciaries); *see also* Reish & Faucher, *supra* note 65.

This Note focuses primarily on director functional fiduciary roles within a corporation, not only because this is the more typical situation when discussing director liability for mismanagement of 401(k) plans, but also because fiduciary status of a functional fiduciary is not as clearly defined and causes more confusion.

77. *See In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 284 F. Supp. 2d 511, 659-60 (S.D. Tex. 2003).

78. *See id.* (according to the relevant terms of the Savings Plan, Enron had exercised the

selection of the 401(k) investments.⁷⁹ Those appointed will then become named fiduciaries under the plan and, like all named fiduciaries, must perform their duties under the “prudent expert” standard.⁸⁰

In situations where the board appoints committee members to manage and administer the plan, the board members will be fiduciaries to the extent that they retain any discretionary authority or control over the plan.⁸¹ With regard to fiduciary duties of the board of directors, the Department of Labor (DOL), the government agency charged with interpreting and enforcing the provisions of Title I of ERISA,⁸² stated:

Members of the board of directors of an employer which maintains an employee benefit plan⁸³ will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act [ERISA]. For example, *the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise ‘discretionary authority or discretionary control respecting management of such plan’ and are, therefore, fiduciaries with respect to the plan.* However, their responsibility, and, consequently, their liability, is limited to the selection and retention of fiduciaries (apart from co-fiduciary liability . . .).⁸⁴

power of appointment, which, as a corporation, it necessarily did through its Board of Directors). The Savings Plan in *Enron* was a 401(k) plan that permitted participants to “invest their deferrals among an array of investment funds.” Marianne W. Culver, *Current Issues in Employee Benefits Litigation*, 697 PRACTICING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES: LITIG., 839, 884 (2003). One of these funds was an Enron stock fund. Enron’s matching contributions under the plan were made primarily in Enron stock as an ESOP. *Id.* at 884-85.

79. *Fiduciary Responsibility for 401(k) Plans*, *supra* note 72; see e.g., *Enron Corp.*, 284 F. Supp. 2d at 659; *Crowley ex rel. Corning, Inc. Inv. Plan. v. Corning, Inc.*, 234 F. Supp. 2d 222, 229 (W.D.N.Y. 2002); *Hull v. Policy Mgmt. Sys. Corp.*, No. CIV. A. 3:00-778-17, 2001 WL 183686, at *6 (D.S.C. Feb. 9, 2001).

80. *Fiduciary Responsibility for 401(k) Plans*, *supra* note 72.

81. See, e.g., *Yeseta v. Baima*, 837 F.2d 380, 384-85 (9th Cir. 1988); *Leigh v. Engle*, 727 F.2d 113, 134-35 (7th Cir. 1984); see also Fred Reish & Bruce Ashton, Reish Luftman Reicher & Cohen, *Who Are the Investment Fiduciaries for Your Company’s 401(k) Plan? (Part II)* (Aug. 2002), at http://www.reish.com/publications/article_detail.cfm?ARTICLEID=241.

82. See 29 U.S.C. § 1135 (2000); see also Plaintiff’s Complaint, *Enron Corp.*, 284 F. Supp. 2d 659 (S.D. Tex. 2003) (No. CIV.A.H01-3913) [hereinafter DOL Complaint] (Secretary of DOL’s Complaint), available at http://www.dol.gov/_sec/media/announcements/lawsuit.pdf. Although the DOL’s regulations do not have the force of law, courts should give deference to the DOL’s reasonable interpretations. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

83. According to ERISA, an “‘employee benefit plan’ or ‘plan’ means an employee welfare benefit plan or employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” 29 U.S.C.A.; § 1002(3).

84. 29 C.F.R. § 2509.75-8 (2004) (emphasis added); see also *Landry v. Air Line Pilots Ass’n*

The DOL reiterated this stance on directors' fiduciary status in its *Enron* brief opposing the defendants' motions to dismiss, arguing that directors who had the power to appoint, retain, and remove members of the Administrative Committee had discretionary authority over the management or administration of a plan under ERISA, and were therefore fiduciaries with respect to those obligations.⁸⁵ The U.S. District Judge Melinda Harmon in Houston agreed with the DOL and denied Enron's motions to dismiss.⁸⁶ If the board of directors is given the responsibility to appoint officers or committee members to oversee the administration and investment of the plan, they will not only be obligated to exercise prudence in appointing qualified members, but will also be obligated to "take prudent and reasonable action to determine whether the administrators [are] fulfilling their fiduciary obligations,"⁸⁷ by regularly monitoring their performance.⁸⁸ However, aside from appointing and monitoring obligations, if the board members act in any other capacity with respect to the plan, such as advising plan participants of various investment options, they will likely be subject to further fiduciary duties with regard to those actions.⁸⁹

The broad definition of fiduciary status found under ERISA provides for various circumstances in which directors are fiduciaries with respect to a 401(k) plan, and thereby subject to the high standard of loyalty and care required of an ERISA fiduciary. Accordingly, it is imperative that directors realize when they are acting in such a position, particularly when acting as functional fiduciaries, so that they can establish procedures and guidelines to protect themselves from potential liability. Although the law is currently unsettled with regard to directors' liability for mismanagement of 401(k) plans, it is likely that with the recent upsurge in high-publicity cases involving employees who have lost their retirement due to corporate scandals, courts will further expand fiduciary status and fiduciary duties under ERISA. In fact, the DOL's heavy-handed brief against Enron's corporate defendants should send a warning signal to board members that any involvement with a 401(k) plan resulting in losses to employees may subject them to liability under ERISA.

Int'l AFL-CIO, 901 F.2d 404, 417 (5th Cir. 1990) (holding that members of the board of directors of an employer that maintains an employee benefit plan will be viewed as fiduciaries for *only* those functions listed in ERISA § 3(21)(A) for which they exercise discretionary control or authority, such as the selection and retention of plan fiduciaries).

85. Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss, at 9-10, *Enron Corp.*, 284 F. Supp. 2d 659 (S.D. Tex. 2003) (No. CIV.A.H-01-3913) [hereinafter Amended Brief of the Secretary of Labor], available at WL 32157092.

86. *Enron Corp.*, 284 F. Supp. 2d at 511.

87. *Leigh v. Engle*, 727 F.2d 113, 135 (7th Cir. 1984).

88. Fred Reish & Gail Reish, *Fiduciary Responsibilities for Managing 401(k) Plans and Their Investments*, THE PENSION ACTUARY, May-June 2001, available at http://www.unifiedtrust.com/Fiduciary_Responsibilities_for_Managing_ERISA_Investments.pdf.

89. See, e.g., *Leigh*, 727 F.2d at 136; Arden Dale, *Fund Probe Highlights Shifting Ground for Fiduciaries*, DOW JONES NEWS SERVICE, Nov. 14, 2003.

However, rather than deterring directors from offering 401(k) plans in the future, cases such as *Enron* should provide directors with foresight into potential liability, thereby enabling them to put into place adequate cost-effective procedures that will shield the directors from personal liability, and at the same time, help prevent plan losses in the first instance. The next sections outline various situations in which directors are likely to be held liable with respect to employees' suits arising out of 401(k) losses and possible preventative measures that directors can take to avoid such potential liability.

B. Situations Involving Potential Liability for a Director Acting as a Fiduciary

Informing directors of their potential liability regarding their involvement with 401(k) assets is essential to the financial security of American retirees in two ways: 1) directors will have an incentive to put into place preventative measures to safeguard plan assets, thereby decreasing the likelihood that they will face liability; and 2) by decreasing their potential liability, directors will be more willing to continue to offer 401(k) plans in the future (assuming that the costs for the necessary preventative measures do not outweigh the benefits to employers who voluntarily offer such plans).

1. De Facto Control over Investment Options.—One of the most obvious ways that a director can become subject to liability for mismanagement of plan assets is to exercise de facto control over the plan options. Although the director is not named in the plan to carry out such functions, the court will look beyond the plan's terms to identify who is actually exercising discretionary control, either directly or indirectly, over the management plan assets.⁹⁰

In *Leigh v. Engle*, the court was faced with the issue of de facto control under ERISA concerning two defendants, Libco Corporation and Clyde Engle.⁹¹ Defendant Libco Corporation was a holding company that acquired one hundred percent of the common stock of Reliable Manufacturing and consequently was responsible for appointing the directors of that company. Defendant Engle had a controlling interest in Libco and was a director of Reliable Manufacturing, thus

90. 29 U.S.C. § 1002(21)(A) (2000) (“[A] person is a fiduciary with respect to a plan to the extent . . . he exercises *any* discretionary authority or discretionary control respecting management of such plan or exercises *any* authority or control respecting management or disposition of its assets”) (emphasis added).

91. *Leigh*, 727 F.2d at 113. The type of retirement plan at issue in *Leigh* was a profit-sharing trust, as opposed to a 401(k) plan. *Id.* at 115. A profit-sharing trust is a plan where the employer uses a portion of the profits of the company in a trust fund for eventual distribution to employees upon some specified events, such as death, disability, termination, or attainment of a specified retirement age. See James T. Tilton & Janice R. Moore, *Non-Qualified Deferred Compensation: Postponing Taxation While Securing the Benefit*, 275 PLI/TAX 283, 326-28 (1988). Nevertheless, the same ERISA provisions would apply to a director who exercises de facto control over a 401(k) plan. See *supra* Part I.

responsible for appointing the plan administrators.⁹² The district court found that Libco and Engle were not fiduciaries with respect to the investment because plaintiffs failed to show that they exercised direct control over investment options.⁹³ The court of appeals was more skeptical. Although on paper, Engle's and Libco's authority over the plan could be exercised only indirectly through appointment power, the court found that, "ERISA directs courts to look beyond Engle and Libco's formal authority with respect to the plan, limited to selection and retention of administrators, and to consider what *real authority* they had over plan investments."⁹⁴ Through their selection of appointees, Dardick and Zuckerman, Engle and Libco "presumably obtained substantial de facto control over plan investment decisions."⁹⁵ Dardick was Engle's personal attorney and general counsel to Engle's various businesses and, consequently, most of Dardick's income came from an entity controlled by Engle. Furthermore, Dardick was assisting Engle and Libco in the acquisition of the three companies for which the plan administrators were investing plan assets.⁹⁶

Zuckerman, on the other hand, was a paid member of the Libco board and an investment consultant to Libco; thus, he was ultimately hired by Engle.⁹⁷ He was also the president of Reliable Manufacturing and member of its board, and, therefore, he too had substantial interest in the outcome of the acquisition efforts that was congruent with Engle's and Libco's.⁹⁸

Ultimately, the court of appeals found that the plaintiffs failed to show that the district court clearly erred in finding that the defendants did not exercise authority over the trust's investments, but then proceeded to hold the defendants liable for their involvement in the plan in various other capacities.⁹⁹ Nevertheless, this is a situation where the court could have found de facto control by a director, and would have likely done so if the standard was not clearly erroneous and had there not been another avenue to hold Engle liable. This was a situation where Engle appointed plan administrators who he had significant control over and who had similar goals to his own and therefore would effectuate those goals through the administrator's authority to invest plan assets. Directors who put themselves in that position should be on notice that they will likely be subject to fiduciary liability arising out of the mismanagement of plan assets.

92. *Leigh*, 727 F.2d at 116-17, 135.

93. *Id.* at 135.

94. *Id.* (emphasis added). *But see* *Crowley ex rel. Corning, Inc. Inv. Plan v. Corning, Inc.*, 234 F. Supp. 2d 222, 229 (W.D.N.Y. 2002) (finding that the "only power the Board had under the Plan was to appoint, retain, or remove members of the Committee[and t]hus, the Board's fiduciary obligations can extend only as to those acts") (citation omitted).

95. *Leigh*, 727 F.2d at 135.

96. *Id.*

97. *Id.* at 117.

98. *Id.* at 135.

99. *Leigh v. Engle*, 858 F.2d 361, 364 (7th Cir. 1988); *see infra* text accompany notes 115-16.

A similar situation occurred in *Keach v. U.S. Trust Co.*,¹⁰⁰ but here, the court found, based upon the court's language in *Leigh*, that the directors were exercising de facto control over the plan assets by appointing a specific trustee to effect a stock purchase transaction and therefore had relatively extensive fiduciary duties. Defendant Thomas Foster, chairman of the board of directors, and Defendant Melvyn Regal, vice chairman of the board of directors, were not named fiduciaries of the plan, but they both actively selected U.S. Trust as the trustee for the Plan. Consequently, the court looked beyond the limited duty of selection and retention of the plan administrators to determine if Foster or Regal had actual authority over the plan's investments.¹⁰¹ The court found that the directors had appointed U.S. Trust as trustee to replace the former trustee "apparently with the sole purpose of effectuating the stock purchase transaction,"¹⁰² as Regal testified in his deposition that there would have been no need to appoint a trustee if the transaction was not going to take place.¹⁰³ Accordingly, the court held:

[T]he selection of U.S. Trust as trustee for the ESOP was so inextricably intertwined with the desired end of effectuating the stock purchase transaction that the act of appointing the trustee essentially exercised *de facto* control over the plans [sic] assets and management. Thus, the particular facts of this case make it readily distinguishable from the cases cited by Foster and Regal, as their actions clearly constituted the "something more" than the mere holding of a corporate office or appointment power found to be insufficient to bestow fiduciary status over the distribution of plan assets in those cases.¹⁰⁴

The findings in *Leigh* and *Keach* should not be surprising. Under ERISA, if a director is exercising actual control over plan assets, directly or indirectly, he will be held to the high standards of fiduciary duty outlined in ERISA. Directors cannot shield themselves from liability by appointing someone else to do what they want done. As a result, unless directors can meet the fiduciary obligations under ERISA for management and investment of plan assets,¹⁰⁵ they should

100. 234 F. Supp. 2d 872 (C.D. Ill. 2002). This case did not involve a 401(k), but rather an ESOP. However, like *Leigh*, the court's reasoning with respect to ERISA fiduciary duties would be analogous to 401(k) plan as the ERISA provisions are the same under both plans. See *supra* text accompanying note 42.

101. *Keach*, 234 F. Supp. 2d at 881-82.

102. *Id.* at 882.

103. *Id.*

104. *Id.* at 882-83.

105. See ERISA § 404(a), 29 U.S.C. § 1104(a) (2000) and ERISA § 406(b), 29 U.S.C. § 1106(b). For example, under ERISA section 406(b)(1), the "selection of a person to manage the investment of plan funds constitutes dealing with plan assets, if such a delegation were made in a manner which operates in a plan fiduciary's own interest or for its own account, the delegation of investment management authority would be . . . prohibited . . ." *Op. F-3867 A*, 1992 ERISA LEXIS 38, at *10 (Dep't of Labor, Pension & Welfare Benefit Programs, Jan. 17, 1992).

refrain from appointing plan administrators over whom they exercise significant control. Furthermore, when directors place themselves in such a situation, the court should construe their fiduciary obligations strictly so as to ensure that directors will not have an incentive to mismanage plan assets for their own benefit. ERISA was enacted to prevent just this sort of behavior by plan fiduciaries. Therefore, a hard-line approach against directors who knowingly violate their fiduciary obligations at the expense of employees' retirement security will most effectively assure that the goals of ERISA are realized.

To prevent litigation based on the allegation of de facto control, the board members should appoint only independent plan administrators who are free from any conflicts of interest concerning plan investments. The less intertwining the board members have with plan administrators, the less likely they will be subject to liability based upon de facto control, and the more likely plan assets will be properly invested.

2. *Appointing and Monitoring Plan Administrators.*—Typically, the board members, either through the plan documents or simply by way of normal business operations, will have a duty to appoint 401(k) plan fiduciaries and to periodically review their performance.¹⁰⁶ Consequently, a director will likely first be subject to fiduciary duties when deciding who to appoint as plan fiduciaries.¹⁰⁷ In *Martin v. Harline*,¹⁰⁸ the plan document, like many plan documents, gave the board of directors the responsibility of appointing

106. See Reish & Ashton, *supra* note 81.

107. Is it well-settled that the act of appointing plan administrators is a fiduciary function and thereby confers fiduciary status. See *Liss v. Smith*, 991 F. Supp. 278, 310 (S.D.N.Y. 1998). However, in *In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 760 (S.D.N.Y. 2003), the court found that plaintiff's arguments that the directors were ERISA fiduciaries merely because of their power to appoint and remove individuals as plan administrators or investment fiduciaries was going too far. The DOL, in its brief filed on January 19, 2004, opposed the view taken by the court, arguing that ERISA imposes an obligation on those who appoint plan fiduciaries to monitor and oversee their decisions, as they are also fiduciaries under the plan. See *News Briefs: Labor Department Backs Suit Against WorldCom*, PENSIONS & INVESTMENTS, Jan. 26, 2004, at 50, available at 2004 WL 65596562. The *Enron* court agreed with the DOL, finding that the power to appoint and remove individuals does confer fiduciary status. The court distinguished *WorldCom* by noting that "WorldCom did not appoint anyone as a fiduciary and there apparently were no allegations that Director Defendants *functioned* as fiduciaries, i.e., actually appointed persons to or removed persons from such positions." *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 284 F. Supp. 2d 511, 553 n.59 (S.D. Tex. 2003) (emphasis in original).

Consequently, when a director is given the role of appointment, either under the plan or through his position in the company, he becomes a fiduciary under the plan and must discharge those duties in a prudent manner. See ERISA § 404(a), 29 U.S.C. § 1104(a).

108. 15 Employee Benefits Cas. 1138, No. 87-NC-115J, 1992 U.S. Dist. LEXIS 8778 (D. Utah Mar. 30, 1992). The Plan document in this case was an ESOP; however, the analysis with regard to fiduciary obligations under ERISA for appointment of plan fiduciaries will be analogous to 401(k) plans. See *supra* text accompanying note 42.

fiduciaries to carry out the management of the plan assets.¹⁰⁹ In fulfilling this obligation, the board members have a duty to prudently appoint qualified plan fiduciaries. If directors appoint unqualified plan fiduciaries

who are untutored and inexperienced in the operations of [the Plan] and the investment of its assets [they] owe a special duty to the Plan to ensure that the appointed fiduciary clearly understands his obligations, that he has at his disposal the appropriate tools to perform his duties with integrity and competence, and that he is appropriately using those tools.¹¹⁰

To avoid a special duty and increased potential liability for appointing untutored and inexperienced plan participants, directors should appoint experienced committee members who are skilled in investing and who can prudently select a team of advisors to assist in devising investment alternatives.¹¹¹

Furthermore, directors' duties do not end after appointment of plan committee members. Directors are also subject to ERISA fiduciary obligations to the extent that they have responsibility for oversight or retention of plan administrators.¹¹² Since ERISA recognizes that a person may be subject to fiduciary obligations for some purposes and not others, directors can be liable for failure to monitor and oversee plan committee members, even if they are not found liable with respect to the administrators' investment decisions.¹¹³ Thus,

109. *Harline*, 1992 U.S. Dist. Lexis 8778 at *3.

110. *Id.* at *29. The duty to use reasonable care in selecting and instructing a qualified person to delegate responsibility for plan assets is analogous to that of a trustee. *Id.* at *29-30.

111. *Reish & Faucher*, *supra* note 65.

112. *See Martin v. Schwab*, 15 Employee Benefits Cas. 2135, No. CIV.A.91-5059-CVSW-1, 1992 WL 296531, at *4 (W.D. Mo. Aug. 11, 1992); *see also In re Elec. Data Sys. Corp., "ERISA" Litig.*, 303 F. Supp. 2d 658, 671 (E.D. Tex. 2004) (finding that ERISA law imposes a duty on fiduciaries with appointment power to monitor appointees); *Rankin v. Rots*, 278 F. Supp. 2d 853, 871 (E.D. Mich. 2003) (stating that the directors delegated discretionary authority with respect to the plan and therefore had a duty to monitor the decision of those to whom authority had been delegated).

113. *Leigh v. Engle*, 727 F.2d 113, 134-35 (7th Cir. 1984) (holding that Engle and Libco had a duty to appropriately monitor the administrators' actions). The duty to properly monitor and oversee plan fiduciaries can be found in ERISA sections 404 and 405(a). Under ERISA section 404(a), 29 U.S.C. § 1104(a), a fiduciary is required to discharge his fiduciary duties with care, skill, prudence, and diligence. Under ERISA section 405(a), 29 U.S.C. § 1105(a), a fiduciary is responsible for his co-fiduciaries' breaches:

- (1) if he participates knowingly in . . . an act or omission of such other fiduciary . . . ;
- (2) if, by his failure to comply with section 404(a)(1) . . . in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
- (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Some courts have distinguished section 404(a) from section 405(a) by describing section 405(a)

directors cannot abdicate their duties by merely giving over the day-to-day operations of the plan investments to even qualified appointees. Rather, directors have a continuing duty to “act with an appropriate prudence and reasonableness in overseeing” the plan administrators’ management of the plan.¹¹⁴ In *Leigh*, the

more specifically as “co-fiduciary liability,” where a fiduciary has knowledge of another fiduciaries’ breach, but fails to do anything to correct it. However, when analyzing directors’ duties after appointment, section 405(a) is essentially a failure of oversight responsibility—allowing another fiduciary to breach his duties without taking any corrective actions. It makes little sense to analyze section 404(a) and section 405(a) differently, since section 405(a) includes breaches under section 404(a). Nevertheless, some courts require more to show co-fiduciary liability, such as actual knowledge. *See Keach v. U.S. Trust Co.*, 240 F. Supp. 2d 840, 844 (C.D. Ill. 2002) (finding that co-fiduciary liability under section 405(a) requires “actual knowledge” of the breach); *see also Donovan v. Cunningham*, 716 F.2d 1455, 1475 (5th Cir. 1983) (for same proposition).

Consequently, any fiduciary who becomes aware that a co-fiduciary has breached his fiduciary duty may not avoid liability by simply ignoring the breach and hiding his head in the sand. *See Jackson v. Truck Drivers’ Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1141 (D. Mass. 1996). In its brief in opposition to the motions to dismiss in *Enron*, the DOL argued that even if the “[c]ourt were to find that [certain defendants] were not liable under § 404 . . . the Court could find these defendants liable under § 405 . . . , if their actions enabled other fiduciaries to breach their duties.” Amended Brief of the Secretary of Labor, *supra* note 85, at 14. A fiduciary who breaches section 405 is jointly and severally liable with the breaching fiduciary. ERISA section 405(a), 29 U.S.C. § 1105(a) (2000).

114. *Leigh*, 727 F.2d at 135; *see also Newton v. Van Otterloo*, 756 F. Supp. 1121, 1132 (N.D. Ind. 1991) (finding that the power to appoint and remove plan fiduciaries makes board members fiduciaries, thus requiring adherence to the standards of ERISA section 404, and additionally entails the duty to appropriately monitor the administrators’ actions). However, in *Crowley ex rel. Corning, Inc. Investment Plan v. Corning, Inc.*, 234 F. Supp. 2d 222 (W.D.N.Y. 2002), the court did not place any significance on the directors’ duty of oversight and retention of plan fiduciaries, and instead focused on the directors’ duties outlined in the plan document. *Corning*, 234 F. Supp. 2d at 222. The complaint in *Corning* alleged that defendants had breached their fiduciary duties by continuing to offer company stock as an investment alternative, by over-allocating company stock in the plan, and by making material misrepresentations and failing to disclose crucial information regarding the stock; thereby causing losses to the plan. *Id.* at 227. The court found that the board of directors held fiduciary duties only with respect to those powers specifically defined under the plan document, which consisted of appointing, retaining, or removing members of the Committee. *Id.* at 229. Nevertheless, the court found that since plaintiffs made no allegation that the directors breached any fiduciary duty when it *appointed* members of the Committee, and since, under the plan, the directors were not responsible for investment options or management of plan assets, the complaint failed to state a claim against the directors. *Id.* at 229-30. It appears that the court in *Crowley* did not recognize directors’ duty to monitor after appointment. Arguably, however, this omission may have been a result of plaintiff’s failure to state a claim with respect to monitoring and oversight responsibilities. The court is unclear regarding this issue. *See also Hull v. Policy Mgmt. Sys. Corp.*, No. CIV.A.3:00-778-17, 2001 WL 1836286, at *7 (D.S.C. Feb. 9, 2001) (“Assuming the Board’s right to remove Committee members might be stretched to include a duty of supervision . . . there are simply no allegations in the complaint adequate to support a

court held that although Engle, the director responsible for appointing and removing the trust administrators, was not obligated to examine every action taken by Dardick and Zuckerman, the plan administrators, in light of their knowledge that the administrators were faced with conflicting loyalties with respect to plan investments, the directors were obligated to take prudent and reasonable action to ensure that the administrators were fulfilling their fiduciary responsibilities.¹¹⁵ The administrators in *Leigh* breached their fiduciary duties when they made investment decisions based not on the best interests of the plan participants, but out of personal motivations. The trial court found that Engle was aware of the administrators' breach, but failed to do anything to rectify the situation. By not doing so, Engle failed to meet his fiduciary duties under ERISA.¹¹⁶

In *Martin v. Harline*, the CBI board of directors was given the responsibility under the Plan Document to "periodically review performance of Fiduciaries to whom any allocation or delegation of duties has been made by the Board of Directors."¹¹⁷ The directors, including Harline, were placed on notice, or reasonably should have been placed on notice, by several different entities, concerning the imprudent investments being made by the plan administrators, Nuffer and Harris.¹¹⁸ Particularly, the Federal Reserve Bank of San Francisco sent the CBI Board of Directors a Report of Inspection strongly recommending that the board have qualified external appraisers take independent valuations of company stock and citing a number of possible violations of ERISA in connection with management and administration of the plan.¹¹⁹ Nevertheless, the board members failed to take the recommended action. The court held that the Board of Directors:

claim for failure to supervise the Committee."'). In any case, the court in *Corning* interpreted the directors' fiduciary responsibilities far more narrowly than did the DOL in its complaint and motion in opposition of dismissal in the Enron litigation, which opposition the *Enron* court later upheld. See Roger C. Siske & Michael R. Maryn, *ESOPs: A Case Study*, SJ013 ALI-ABA 519, 559 (2003).

115. *Leigh*, 727 F.2d at 136 (remanding to determine if the directors had violated their fiduciary duty of oversight; however, the court noted that "[n]othing in the record" demonstrated that the corporation's board or its chairman "took steps either to insure that [the plan administrators] were fulfilling their fiduciary obligations or to remedy any violations which might have already occurred"); see also *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 435 (3d Cir. 1996) (finding that fiduciaries do not need to duplicate their advisers' investigative efforts, but they do have a duty to review their advisers' data, to determine its significance, and supplement the information if needed; merely accepting advisers' findings without more, is not sufficient).

116. *Leigh v. Engle*, 858 F.2d 361, 364 (7th Cir. 1988). Essentially, the court's ruling falls under ERISA section 405(a), 29 U.S.C. § 1105(a), by finding that the corporation and its chairman knew of, yet chose to ignore, improper investment decisions.

117. *Martin v. Harline*, 15 Employee Benefits Cas. 1138, No. 87-NC-115J, 1992 U.S. Dist. LEXIS 8778, at *3 (D.C. Utah Mar. 30, 1992).

118. *Id.* at *17-23.

119. *Id.* at *20-23.

[I]mprudently permitted Nuffer and Harris to continue to purchase shares of CBI with Plan assets when they knew or through the exercise of reasonable diligence should have known that the prices paid for the shares acquired were not determined by a qualified contemporaneous valuation and were in excess of the fair market value of such shares; and imprudently failed to remove Nuffer or take the appropriate steps to prevent Nuffer from continuing to violate ERISA¹²⁰

Additionally the court found that permitting Harris to supervise the Plan fiduciaries was imprudent under ERISA section 404(a)(1)(B),¹²¹ 29 U.S.C. § 1104(a)(1)(B), given the deteriorating condition of the company and the participation by Harris in insider transactions involving the Plan.¹²² Under these circumstances, the directors violated their duty to appropriately monitor and review the plan fiduciaries and, therefore, the directors were subject to personal liability for the plan losses.¹²³

DOL took a similar stance in their complaint against Enron's board of directors and officers, Lay and Skilling, who were responsible for appointing, monitoring, and removing the members of the Plan Administrative Committee. The DOL argued:

As Enron's stock lost nearly all of its value during 2001, the Plans' fiduciaries never considered the prudence of the Plans' investment in Enron stock or took any action to protect the value of the participants' retirement accounts.¹²⁴ As a result of the fiduciaries' total and complete

120. *Id.* at *27.

121. See text accompanying *supra* note 49.

122. *Harline*, 1992 U.S. Dist. LEXIS 8778, at *31.

123. The court additionally found that director Harline breached his fiduciary duty under ERISA section 405, 29 U.S.C. § 1105, with regard to the actions of Harris and Nuffer, since he had actual or constructive knowledge of the facts constituting their breaches of fiduciary duty and failed to take reasonable steps to remedy such breaches. *Id.* at *32; see also text accompanying *supra* note 113. The fact that Harline was one of several defendants that could have taken action to remedy the breach did not absolve Harline of responsibility because liability for breaching fiduciary duty is joint and several—"there is no safety in numbers." *Harline*, 1992 U.S. Dist. LEXIS 8778, at *32 n.1.

124. Enron had three plans: the Enron Corp. Savings Plan, the Enron Corp. Employee Stock Ownership Plan (ESOP), and the Cash Balance Plan. See Amended Brief of the Secretary of Labor, *supra* note 85. As the DOL in *Enron* analyzed all three plans under the same ERISA fiduciary duties with regard to the specific functions delegated to the various actors within each plan, so too did the court. In *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, 284 F. Supp. 2d 511, 660-61 (S.D. Tex. 2003), the court analyzed the employee savings plan and the ESOP congruently finding that the allegations that the employer, management committees, officers, and directors had power to appoint, retain, and remove ERISA plan fiduciaries; that they exercised discretionary authority of appointment over management or administration of plans, and that they failed to insure that selected fiduciaries complied with their fiduciary duties, were sufficient

inaction, the Plans lost much of their value and thousands of participants were left with uncertain futures.¹²⁵

Essentially, the DOL asserted that although Lay and Skilling were not named fiduciaries relative to the Plans, they were Plan fiduciaries because they exercised authority over the selection of Administrative Committee members.¹²⁶ However, according to the DOL, Lay and Skilling breached their fiduciary duties imposed by ERISA because they failed to monitor the Committee's performance, failed to provide the Committee with adverse knowledge about Enron's true financial condition, of which they were aware, and actively misled participants about Enron's financial condition despite knowledge of its deteriorating condition.¹²⁷ Although the board of directors possessed both public and nonpublic information that should have put them on notice that the plan fiduciaries, who they appointed, were not acting with prudence with regard to plan assets, they failed to take any action to correct the fiduciaries breach of both the duty of loyalty and duty of care.¹²⁸

Although directors are not obligated to reinvestigate the merits of the plan committee's decisions, they should establish procedures for conduct and create a system of reporting and supervision to facilitate monitoring by the board of directors.¹²⁹ Directors who have responsibility for appointment are required to review the performance of the plan appointees at reasonable intervals "in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan."¹³⁰ However, if the terms of the plan are such that following them would not be in the best interest of the participants, an investment fiduciary

evidence to support a claim for breach of fiduciary duties of loyalty and prudence under ERISA. The Savings Plan, which was a 401(k), permitted the participants to direct that their employee contributions be invested in one or more of several investment alternatives, one of which included Enron Stock. Amended Brief of the Secretary of Labor, *supra* note 85, at 34. Furthermore, as noted in *supra* note 42, ESOPs are often analyzed congruently with 401(k) plans, as they are typically part of the same plan.

125. DOL Complaint, *supra* note 82, at 4.

126. As asserted earlier, board members commonly appoint plan administrators, and consequently they would be "functional" fiduciaries with respect to the plan.

127. DOL Complaint, *supra* note 82, at 26. See the next section for further discussion on misrepresentations or omissions by directors regarding 401(k) plans.

128. DOL Complaint, *supra* note 82, at 29.

129. *Martin v. Hairline*, 15 Employee Benefits Cas. 1138, No. 87-NC-115J, 1992 U.S. Dist. LEXIS 8778, at *30 (D.C. Utah Mar. 30, 1992). Where appointing fiduciaries do not establish a procedure to monitor the performance of the plan's appointed trustees, they have violated their duty of prudence and loyalty under ERISA section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (2000). See *Sandoval v. Simmons*, 622 F. Supp. 1174, 1215-16 (C.D. Ill. 1985).

130. 29 C.F.R. § 2509.75-8 (2005); see also *Henry v. Frontier Indus., Inc.*, Nos. 87-3879 and 87-3898, 1988 WL 132577, at *3 (9th Cir. Dec. 1, 1988) (unpublished table decision).

must disregard the plan.¹³¹ Because the appointing directors not only have a duty to monitor the fiduciaries' actions, but also have a duty to monitor the investment of the plan assets,¹³² this may entail going outside the terms of the plan if doing so would be prudent. If the directors discover that the appointees have taken inappropriate action and have not adequately protected the interests of the plans' participants and beneficiaries, then the directors have a subsequent duty to take remedial measures, including possible removal of appointees or perhaps even withdrawing the plan's investments.¹³³

Leigh, *Enron*, and *Harline* all illustrate the importance of procedural diligence for directors when appointing plan fiduciaries. The first step is to find qualified appointees who are equipped with the skills and tools to effectively manage the plan assets. Subsequently, it is equally important that the directors continue to monitor and oversee the appointed plan fiduciaries to ensure that they remain qualified to manage the plan investments. While this admittedly places a burden on directors to effectuate and maintain procedures to ensure effective management of 401(k) plans, this burden is necessary to maintain employee retirement plans, specifically 401(k) plans. This burden faced by directors is likely to continue its ascent as public opinion increasingly shifts in disfavor of large corporations in light of the recent scandals by corporate defendants for mismanagement of 401(k) plans. For example, in *Enron*, the DOL argued for much broader fiduciary duties to be placed on directors for their involvement with 401(k) plans, and, consequently, directors need to be aware of the possibility of facing increased liability.

Fortunately, the courts in such cases as *Leigh* and *Harline* held, and even the DOL in *Enron* argued, that liability should be found only in those situations where the Board should have been on notice that the plan fiduciaries were breaching their duties under ERISA.¹³⁴ In the preceding three cases, the board

131. See *Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisers, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999); *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983); see also *Rankin v. Rots*, 278 F. Supp. 2d 853, 878 (E.D. Mich. 2003) ("Contrary to the Outside Directors' implication, a fiduciary is not required to blindly follow the Plan's requirements. Indeed, 'a fiduciary must also act "in accordance with the documents and instruments governing the plan," insofar as those documents are consistent with the provisions of ERISA.'") (quoting *Best v. Cyrus*, 310 F.3d 932, 935 (6th Cir. 2002)). But see *In re McKesson HBOC, Inc.*, 29 Employee Benefit Cas. 1229, 2002 U.S. Dist. LEXIS 19473, at *16-17 (N.D. Cal. Sept. 30, 2002) (finding that the plan required investment in company stock and was therefore presumptively proper for the fiduciaries to follow the plan's direction to do so).

132. See *Mehling v. N.Y. Life Ins. Co.*, 163 F. Supp. 2d 502, 509-10 (E.D. Pa. 2001) (finding that implicit in the power to select the Plans' named fiduciaries was the duty to monitor the fiduciaries' actions, including their investment of plan assets).

133. See *Liss v. Smith*, 991 F. Supp. 278, 311 (S.D.N.Y. 1998); see also *Whitfield v. Cohen*, 682 F. Supp. 188, 197 (S.D.N.Y. 1988) (recognizing that monitoring fiduciary had a duty to remove plan assets from investment once it became clear, or should have become clear, that investment was no longer proper for the Plan).

134. Several courts recognizing the duty to monitor have given the duty a limited scope,

members simply failed to observe the information that was immediately obvious. When it became apparent that plan assets were being invested imprudently, the directors had a responsibility to take appropriate investigatory steps with regard to the plan fiduciaries' decision-making. The balance struck by the courts in *Leigh* and *Harline* and the DOL in *Enron* is one that recognizes the goal of maintaining effective retirement plans by creating liability for directors only when they could have prevented loss to the plan by simple oversight and monitoring procedures, such as taking action once they were put on notice of imprudent behavior.¹³⁵ This does not require the board to constantly scrutinize the actions of the plan fiduciaries, but it does require them to periodically evaluate the plan investments to determine whether the fiduciaries are using appropriate methods for choosing investment alternatives. As a result, directors will be dissuaded from failing to correct mismanagement of 401(k) plans which they can reasonably detect, but will not be dissuaded from offering 401(k) plans as a result of overly burdensome oversight responsibilities.

3. *Misrepresentations or Omissions by Directors Regarding 401(k) Plan Assets.*—This section concerns directors' misrepresentations and omissions regarding 401(k) plan assets as an extension of the duty to monitor. In fact, the expansive nature of the DOL's argument in *Enron* is based primarily upon the directors' failure to properly communicate investment information to plan participants.¹³⁶ Therefore, it is highly prudent for directors to recognize the increasingly expansive nature of fiduciary duties with respect to misrepresentations and omissions.

The rise of litigation over ERISA fiduciary duties with regard to 401(k) plans has often originated with a common complaint—that the plan fiduciaries, including company directors, made misrepresentations or breached their duty to disclose material information that directly affected the value of employee 401(k) plans.¹³⁷ Typically, the allegations are based on either misrepresentations that employer stock is a good investment, leading employees to invest more heavily in the company stock, dissuading them from pulling out of the stock, or failure to disclose information about the company which the plan fiduciaries know will influence the employees' decisions regarding how much to invest in company stock, if at all.¹³⁸

The leading Supreme Court case recognizing individual relief for claims

including the three cases outlined in this Section. *See also* *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1466 n.10 (4th Cir. 1996) ("Courts have properly taken a restrictive view of the scope of this duty and its attendant potential for liability.").

135. *See also* *Newton v. Van Otterloo*, 756 F. Supp. 1121, 1132 (N.D. Ind. 1991) (finding that directors have duties to monitor plan fiduciaries whom they appoint but do not breach such duties in the absence of "notice of possible misadventure by their appointees").

136. *See infra* notes 149-54 and accompanying text.

137. *Proceedings, Employee Stock Ownership After Enron: Proceedings of the 2003 Annual Meeting, Association of American Law Schools Section on Employee Benefits*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 213, 221 (2003).

138. *Id.* at 222.

based on breach of fiduciary duty by misleading plan participants is *Varity Corp. v. Howe*.¹³⁹ In that case, the district court found that the company intentionally misled employees when it told them that their benefits would remain the same if they voluntarily transferred their employment to a separately incorporated subsidiary.¹⁴⁰ This case is an extreme example of material misrepresentations. The firm persuaded employees to transfer their stock into a subsidiary company when the firm knew all along that the subsidiary was in serious financial trouble. The company did so by repeatedly and publicly assuring the employees of the plans' integrity. Consequently, the Supreme Court found that the employer/plan administrator was acting in its fiduciary capacity when it communicated this information to plan participants because reasonable employees would have thought that the employer was communicating with them both in its capacity as employer and as plan administrator and because of the context in which the statements about benefits were made.¹⁴¹ Since the employer was acting in its fiduciary capacity when it misled employees, it violated ERISA fiduciary obligations.¹⁴² The Court held:

ERISA requires a "fiduciary" to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act "solely in the interest of the participants and beneficiaries." As other courts have held, "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."¹⁴³

The Court in *Varity Corp.* specifically held that Varity did *not* act as a fiduciary simply because it made statements about its expected financial conditions or that an ordinary business decision had a negative effect on the plan. Rather, Varity Corp. was found liable because it intentionally connected its statement to the future benefits of the plan.¹⁴⁴ Accordingly, *Varity Corp.* established that misrepresentations relating to non-pension benefit plans can establish fiduciary liability for those acting within their fiduciary capacity.¹⁴⁵ Because ERISA

139. 516 U.S. 489 (1996).

140. *Id.* at 498.

141. *Id.* at 503.

142. *Id.* at 506.

143. *Id.* (citations omitted); see e.g., *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996) (holding that it is "well-settled that plan fiduciaries may not affirmatively mislead plan participants about changes, effective or under consideration, to employee pension benefit plans"); *Fischer v. Phila. Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993) ("[W]hen a plan administrator speaks, it must speak truthfully."); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) (finding that a duty of loyalty includes an obligation not to materially mislead plan participants and beneficiaries).

144. *Varity Corp.*, 516 U.S. at 505.

145. Previously, the Court in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S.

defines fiduciary status “functionally,” this can make virtually any employee, including directors, subject to the duty not to mislead. Unfortunately, however, the Court decided not to reach the issue of whether fiduciaries have any fiduciary duty to disclose truthful information on their own initiative.¹⁴⁶

Some courts have subsequently held that fiduciaries not only have an affirmative duty not to mislead, but the duty of loyalty imposed by ERISA also creates a duty to disclose information when silence or inaction is materially misleading.¹⁴⁷ This duty will likely arise in situations where the omission is

134, 140-43 (1985), held that ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), did not provide a remedy for individual beneficiaries in situations similar to that in *Varity Corp.* Section 502(a)(2) states that a civil action may be brought by a participant, beneficiary, or fiduciary for appropriate relief under ERISA section 409, § 29 U.S.C. 1109. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (2000). Section 1109 (a) states:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109. Consequently, *Russell* found that ERISA section 409 plainly authorizes relief only for the plan itself, not individual participants or beneficiaries. *Russell*, 473 U.S. at 144.

The Court in *Varity Corp.*, recognizing the limitation for damages found in section 409, granted individual relief for the misrepresentations based on ERISA section 502(a)(3), 29 U.S.C. § 1132 (a)(3). *Varity Corp.*, 516 U.S. at 509-12. Section 502(a)(3) states that a civil action may be brought in two circumstances:

[B]y a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3). *Varity Corp.* held that this clause operated as a “catchall” provision to provide for individual relief for breaches of fiduciary duty, but is invoked only in the limited instances in which other provisions of ERISA do not provide relief. *Varity Corp.*, 516 U.S. at 509-12. Additionally, section 502(a)(3) is limited to equitable relief. *Id.* The Court in *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993), previously defined equitable relief as forms typically available in equity, such as injunction, restitution, and the like. Subsequently, the Court in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), in a 5-4 decision, dramatically limited the equitable relief available under section 502(a)(3). *Knudson*, 534 U.S. at 210-11. In *Knudson*, the plaintiff wanted to impose personal liability upon a beneficiary to make restitution to the plan, arguing that the defendant was in breach of his contractual obligations under the plan’s reimbursement provision. This provision required the defendant to pay the plan a certain amount of proceeds recovered from third parties. The Court rejected plaintiff’s claim, finding that an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity, as required by ERISA section 502(a)(3). *Id.*

146. *Varity Corp.*, 516 U.S. at 506.

147. See, e.g., *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 9-10 (2d Cir. 1997)

highly prejudicial to the plan participant, and may also be limited to the director disclosing such information to the plan administrator.¹⁴⁸ For example, the DOL urged the court to take this stance in its brief opposing the motion to dismiss of Enron, Enron plan Committee members, Enron officers, and Enron directors. The DOL advocated that the defendants, including director Lay,¹⁴⁹ had a duty, in light of their knowledge, to provide accurate information regarding Enron's financial condition to the Plan Administrators.¹⁵⁰ The DOL provided the following facts in their motion:

57. On October 8, 2001, the Board of Directors was generally informed of the existence of Watkins' memorandum and the concerns it raised.^[151]
58. The import of Watkins' memorandum was clear, or should have been clear, to Lay, Olson[,] and the Board of Directors. Yet, instead of taking action to protect the Plans from the harm of which Watkins had warned, Lay and Olson^[152] responded to Watkins' memorandum by transferring Watkins to a position in Enron's Human Resources Department and by denying her further access to Enron's financial information.
59. Neither Enron, Lay[,], Olson[,], nor the Board of Directors informed the rest of the Plans' fiduciaries of Watkins' concerns or predictions nor did any of these fiduciaries ensure that an independent inquiry

(holding that a summary plan description and benefits counselor's advice amounted to materially misleading information and therefore breached fiduciary duty to provide participants with complete and accurate information); *Glaziers & Glassworkers Local 252 v. Newbridge Sec. Inc.*, 93 F.3d 1171, 1180 (3d Cir. 1996) (finding that the duty to inform is "not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful"); *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993) (finding an affirmative duty to communicate facts concerning employee rights whether or not a beneficiary asks the fiduciaries for the information). *But see Bins v. Exxon Co.*, 220 F.3d 1042, 1045 (9th Cir. 2000) (rejecting "affirmative duty" standard with regard to representations).

148. As the directors are often the appointing body for the administrators, they would have a duty to monitor the administrators' remedial actions after obtaining accurate information regarding plan assets.

149. Directors Lay and Skilling had the responsibility under both the Savings Plan and ESOP to appoint, monitor and remove the members of the Administrative Committee. For a brief description of Savings Plan and ESOP, see *supra* note 78.

150. Amended Brief of the Secretary of Labor, *supra* note 85, at 20.

151. DOL Complaint, *supra* note 82, at 24. On August 14, 2001, Sharon Watkins, Vice-President of Enron at the time, sent out a memorandum to Lay (Skilling quit Enron that day) expressing concern about the accuracy of Enron's publicly reported financial statements. The statement read: "I am incredibly nervous that [Enron] will implode in a wave of accounting scandals. My [eight] years of Enron work history will be worth nothing on my resume." *Id.*

152. Olson was a member of the Plans' Administrative Committee. *Id.* at 22.

was undertaken on behalf of the Plans.¹⁵³

Given these facts, the DOL argued that the fiduciaries not only had a duty to disclose this information to plan fiduciaries, but additionally had a duty not to materially mislead the plan participants by silence or inaction.¹⁵⁴ The DOL asserted that the fiduciaries had violated their duty of loyalty and care under ERISA to carry out the plans for the sole benefit of the participants. The court in *Enron*, agreeing with the DOL and citing to *Varity Corp.*, held that Enron directors may be liable for failure to disclose in special circumstances where there is a potentially “extreme impact” on the ERISA plan as a whole and plan participants generally could be materially and negatively affected.¹⁵⁵ Consequently, in such circumstances, courts might find that the directors have an affirmative duty of disclosure.¹⁵⁶

When analyzing duty not to mislead and duty to disclose cases, however, a court must also reconcile ERISA fiduciary duties with those required by federal security laws. Although dissemination of information could possibly come into conflict with federal security laws, courts have found that the two laws can be reconciled. In *Enron*, the court noted that securities “laws [do] not immunize [defendants] from a claim that they failed in their conduct as ERISA fiduciaries. To the contrary, while their Securities Act and ERISA duties may conflict in some respects, they are congruent in others.”¹⁵⁷ The court acknowledged that there were certain steps that the defendants could have taken to comply with both their duties under ERISA and under securities laws. For example, the directors could have disclosed the information to other shareholders and the public at

153. *Id.* at 24-25.

154. Amended Brief of the Secretary of Labor, *supra* note 85, at 15.

155. *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 284 F. Supp. 2d 511, 658 (S.D. Tex. 2003).

156. *Id.*; ERISA § 404 (a)(1), 29 U.S.C. § 1104 (a)(1) (2000). Nevertheless, the court in *Crowley ex rel. Corning, Inc. Investment Plan v. Corning, Inc.*, 234 F. Supp. 2d 222 (W.D.N.Y. 2002), interpreted directors’ fiduciary responsibilities of appointment, retention, and removal of plan fiduciaries much more narrowly than did the court in *Enron*. *Crowley*, 234 F. Supp. 2d at 230. In *Crowley*, the court found that plaintiff’s claim alleging defendants made material misrepresentations and nondisclosures concerning Corning’s future performance failed because the “Board was not charged under the Plan with the duty of communicating information to the Plan participants or beneficiaries.” *Id.*; see also *In re McKesson HBOC, Inc. ERISA Litig.*, 29 Employee Benefits Cas. 1229, 2002 U.S. Dist. LEXIS 19473, at *52 (N.D. Cal. Sept. 30, 2002) (holding directors not liable for failing to communicate directly with participants where the plan documents did not place such a duty on the directors); *Hull v. Policy Mgmt. Sys. Corp.*, No. CIV.A.3:00-778-17, 2001 WL 1836286, at *7 (D.S.C. Feb. 9, 2001) (finding board member not liable for breach of duty to provide information or duty not to provide false information where the plan does not impose such duties on defendant).

157. *Enron*, 284 F. Supp. 2d at 566. *But see Hull*, 2001 WL 1836286, at *9 (stating in dicta that the defendants did not have a duty to disclose information because to have disclosed nonpublic information would have violated securities laws).

large, because nothing in the securities laws prevented them from doing so or forcing Enron to do so.¹⁵⁸ The court held that the securities laws and ERISA should be “construed to require, as they do, disclosure by Enron officials and plan fiduciaries of Enron’s concealed, material financial status to the investing public generally, including plan participants, whether ‘impractical’ or not, because continued silence and deceit would only encourage the alleged fraud and increase the extent of injury.”¹⁵⁹ Otherwise, the directors could have seen to it that the option of Enron stock be eliminated from the plan, because “securities rules do not require an individual never to make any decision based on insider information. To the contrary, the insider trading rules require corporate insiders to refrain from buying (or selling) stock if they have material, nonpublic information about the stock.”¹⁶⁰

Similarly, in *WorldCom*, the court held that Ebbers, a director and officer of the company who had discretionary control over the administration and management of the plan, would have violated his fiduciary duties under ERISA if the following allegations were shown to be true: (1) he failed to disclose to the investment fiduciary on behalf of the plan all material facts he knew or should have known about the financial conditions of WorldCom and (2) he disseminated materially false data and information about WorldCom to plan participants.¹⁶¹ The court rejected the argument by Ebbers that, as an officer and director, the duties imposed on him as an insider under the federal securities laws necessarily conflicted with the duties imposed by ERISA.¹⁶² The court held, “[w]hen a corporate insider puts on his ERISA hat, he is not assumed to have forgotten adverse information he may have acquired while acting in his corporate capacity.”¹⁶³ The court was clear that when an ERISA fiduciary discloses false information, no exception exists merely because the disclosure concerns the employer’s stock.¹⁶⁴ However, the court limited its ruling, finding that the

158. *Enron*, 284 F. Supp. 2d at 566. The DOL in its Amicus Brief further noted that corporate insiders owe a fiduciary duty to disclose material nonpublic information to the shareholders and trading public. Amended Brief of the Secretary of Labor, *supra* note 85, at 26 (citing to *In re Cady, Roberts & Co.*, 40 S.E.C. 9707, S.E.C. Release No. 34-6668, 1961 WL 60638, at *3 (Nov. 8, 1961) (incorporating the common law rule that insiders should reveal material insider information before trading)).

159. *Enron*, 284 F. Supp. 2d at 565-66; *cited with approval in In re Elec. Data Sys. Corp.*, ERISA Litig., 305 F. Supp. 2d 658, 673 (E.D. Tex. 2004).

160. *Id.* at 566.

161. *In re WorldCom, Inc.*, ERISA Litig., 263 F. Supp. 2d 745, 765-67 (S.D.N.Y. 2003). However, note the different analysis the court gave with respect to Ebbers as opposed to the members of the board of directors as a whole, finding that members of a corporation’s board of directors were not “ERISA fiduciaries” simply because of their control of the corporation and alleged authority to appoint and remove plan fiduciaries. *Id.* at 760-61; *see text accompanying note 107.*

162. *WorldCom*, 263 F. Supp. 2d at 765.

163. *Id.*

164. *Id.* at 765-67.

complaint did not allege that the defendants failed to disclose nonpublic material information to plan participants, but instead, "[w]hat is required, is that any information that is conveyed to participants be conveyed in compliance with the standard of care that applies to ERISA fiduciaries."¹⁶⁵ Furthermore, the court noted that there may be circumstances where securities laws and ERISA are in conflict, but not in this case.¹⁶⁶

Unlike *Enron* and *WorldCom*, however, the court in *In re McKesson HBOC*, did find a conflict between security laws and ERISA.¹⁶⁷ The court held, "[n]ot even a fiduciary acting in its fiduciary capacity is permitted to engage in insider trading. Fiduciaries are not obligated to violate the securities laws in order to satisfy their fiduciary duties."¹⁶⁸ Additionally, the court found that any alternatives which prevented violation of securities laws, such as divesting the plan of McKesson stock, would not have avoided the loss to the plan, and, consequently, no damages were sustained by the plaintiffs.¹⁶⁹

The law surrounding the duty to accurately inform is not at all settled amongst the circuits. Although there is a rather clear duty not to misrepresent or defraud employees regarding their retirement plans, there are still questions as to when a fiduciary is acting within his fiduciary capacity and whether or not a duty to be truthful arises only when employees ask for information or, in more liberal interpretations, any time when silence would harm the participants.¹⁷⁰ To complicate matters even more, courts disagree as to whether or not ERISA fiduciary duties conflict with federal securities laws and if so, how to deal with that conflict. These are issues that were not directly dealt with in *Varity Corp.* and courts have taken varying approaches as to when or if a fiduciary duty attaches. As a result, directors need to be aware of the possible liability they may face for misrepresentations and/or omissions and be prepared to adequately deal with situations where a conflict may arise.

The nature of 401(k) plans should persuade courts that misinformation, whether actively conveyed or through silence, significantly impacts the desired advantages associated with such plans. Typically, 401(k) plans are established to allow the individual employees to choose amongst several investment options which plan is best for them. To effectuate the purpose of 401(k) plans, employees must be provided with accurate information regarding the plan's assets. Otherwise, when a participant is subject to improper influence by the employer or other plan fiduciary, or if a plan fiduciary conceals material

165. *Id.* at 767.

166. *Id.*

167. *In re McKesson HBOC, Inc. ERISA Litig.*, 29 Employee Benefits Cas. 1229, 2002 U.S. Dist. LEXIS 19473, at *20-24 (N.D. Cal. Sept. 30, 2002). *But see Rankin v. Rots*, 278 F. Supp. 2d 853, 874 (E.D. Mich. 2003) (agreeing with both the DOL's Brief in *Enron*, which the *Enron* court mostly adopted, and *Worldcom*, but disagreeing with *In re McKesson HBOC*).

168. *In re McKesson*, 2002 U.S. Dist. LEXIS 19473, at *21.

169. *Id.*

170. *See supra* text accompanying notes 143, 147, 167; *see also* Schmall, *supra* note 28, at 901.

nonpublic information, the participants' exercise of control is no longer independent.¹⁷¹ Although a participant does not have the right to obtain investment advice from a fiduciary,¹⁷² they should at least have the right to obtain the necessary information in order to make prudent investment decisions on their own.

Nevertheless, to prevent the demise of 401(k) plans, directors cannot be placed in a situation where they are forced to either disseminate nonpublic information that is harmful to their company and which they are not required to disclose, or face potential ERISA liability. That result may likely cause directors to simply choose to stop offering 401(k) plans, thereby avoiding the choice between disclosure and liability. The solution is to analyze the duty of misrepresentation and omission under the same guise as monitoring and overseeing responsibilities. If directors have an obligation to appropriately monitor and oversee those they appoint as plan administrators, it only makes sense to require the directors to disclose information which they know or reasonably should know to plan administrators so that they can effectively carry out their duties. Additionally, if the plan administrators do not utilize the information effectively, the directors should have a duty to take remedial action, which may lead to replacement of the plan administrator(s). *Enron* took this one step further by finding that the directors may be liable for failure to disclose to plan participants in special circumstances where there is a potentially "extreme impact" on the ERISA plan as a whole and plan participants generally could be materially and negatively affected.¹⁷³ The language in *Enron*, however, should assure directors that the court will likely only find liability for nondisclosure to plan participants in highly extreme circumstances of plan mismanagement.

Although directors cannot affirmatively mislead plan participants, only under severe and extreme circumstances of harm to a plan *might* a director be required to disclose nonpublic information to plan participants.¹⁷⁴ Therefore, with the exception of the above caveat, directors' duty of misrepresentation and omission should be analyzed congruently as part of their duty to monitor and oversee plan administrators. If courts take such an approach, directors will avoid conflict with federal securities laws, and they will be able to effectively fulfill their duties under ERISA without being subject to overly burdensome responsibilities. The directors will need to simply pass on the appropriate information to the plan administrators and thereafter ensure that these administrators are effectively using such information when managing plan assets.

171. See 29 C.F.R. § 2550.404c-1(c)(2) (2005).

172. See *id.*

173. *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 284 F. Supp. 2d 511, 559 (S.D. Tex. 2003).

174. As noted in this section, courts have taken varying views on whether or not there is a duty placed upon directors to disclose material information to plan participants or even to plan administrators.

IV. ADVICE TO DIRECTORS TO REDUCE THEIR POTENTIAL LIABILITY

After analyzing the various situations in which directors have been found to breach their fiduciary duties under ERISA, it is important to determine what procedures directors can put into place to avoid such breaches. If directors can put cost-effective preventative measures into place to avoid liability for plan losses, they will not have to absorb the cost of potential litigation, and, consequently, they will find it less burdensome and costly to offer 401(k) plans in the future. Furthermore, by implementing such measures, directors will help avoid plan losses in the first place. The ultimate goal of ERISA—to safeguard retirement security—is satisfied under both rationales. The following procedures will essentially create a favorable situation for both directors/employers and employees.

A. Striving to Meet 404(c) Requirements

Directors should first look to ERISA to determine if they can structure their 401(k) plan to meet the requirements of ERISA section 404(c).¹⁷⁵ This particular section of ERISA shields fiduciaries from liability from plan losses if certain conditions are met. According to the DOL in their brief against Enron, the “only circumstances in which ERISA relieves the fiduciary of responsibility for a participant-directed investment is when the plan qualifies as a 404(c) plan.”¹⁷⁶ Section 404(c) arises when a plan provides for individual accounts and permits a participant to exercise control over the assets in his account, but only *if* a participant exercises control over the assets in his account according to regulations determined by the Secretary of Labor.¹⁷⁷ As a result, when the conditions of section 404(c) are met:

- (A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
- (B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant’s or beneficiary’s exercise of control.¹⁷⁸

Unfortunately for directors, the Secretary of Labor has imposed rather exacting standards so as to limit the utility of section 404(c). For this reason, in many cases, the 401(k) plan will not meet the requirements of section 404(c) and directors should therefore be cautious when relying on its protection. The burden to prove that the requirements of section 404(c) are met lies with the fiduciary

175. ERISA § 404(c), 29 U.S.C. § 1104(c) (2000).

176. Amended Brief of the Secretary of Labor, *supra* note 85, at 35.

177. *Id.*; ERISA § 404(c), 29 U.S.C. § 1104(c).

178. ERISA § 404(c)(1)(A)-(B), 29 U.S.C. § 1104(c)(1)(A)-(B).

defendant.¹⁷⁹ In addition, under the analysis provided by *In re Unisys*,¹⁸⁰ to qualify for the protection afforded by 404(c), the defendant must also show that the participant's or beneficiary's control was a cause-in-fact, as well as a substantial contributing factor, in bringing about the loss incurred.¹⁸¹

The regulations imposed by the Secretary of Labor, through the DOL, focus on the participant's ability to exercise meaningful, independent control over the investment of his account.¹⁸² For these regulations to be met, the participant must have the opportunity to: "[c]hoose from a broad range of investment alternatives and diversify investments within and among investment alternatives; [g]ive investment instruction with a frequency which is appropriate in light of the market volatility of the investment alternatives; [and o]btain sufficient information to make informed investment decisions."¹⁸³ Although these standards do not appear overly demanding, further specifications by the DOL illustrate why it is often difficult for companies to comply with 404(c) regulations.¹⁸⁴

For example, a 401(k) plan must afford participants the opportunity to invest in at least three different investment alternatives with the "core investment alternatives" meeting specified requirements.¹⁸⁵ These requirements concentrate on diversification, risk and return characteristics, and the effect of the overall combined investments.¹⁸⁶ Essentially, these requirements "have prompted most

179. See *Allison v. Bank One-Denver*, 289 F.3d 1223, 1238 (10th Cir. 2002); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 446 (3rd Cir. 1996); see also *Rankin v. Rots*, 278 F. Supp. 2d 853, 873 (E.D. Mich. 2003).

180. *In re Unisys*, 74 F.3d 420 (3d Cir. 1996).

181. *Id.* at 445. The case provides for a more detailed understanding of the difficulty in meeting the section 404(c) requirements.

182. 29 C.F.R. § 2550.404c-1(b) (2005).

183. Thomas R. Hoecker, *Applying ERISA'S Fiduciary Standards to 401(K) Plans*, VLR9914 ALI-ABA 91, Section H-1. (2000); see Colleen E. Medill, *Stock Market Volatility and 401(K) Plans*, 34 U. MICH. J.L. REFORM 469, 522-26 (2001) (outlining the framework of the employer's 404(c) regulations defense).

184. This Note is meant to provide the reader with a basic understanding of 404(c) within the context of director liability, rather than provide a comprehensive guideline illustrating how to comply with 404(c) regulations.

185. Hoecker, *supra* note 183, at Section H-2.

186. Those requirements include:

- Each core investment alternative must be diversified.
- Each core investment alternative must have materially different risk or return characteristics.
- When aggregated, the core investment alternatives must enable the participant or beneficiary by choosing them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary.
- Each core investment alternative, when combined with investments in the other alternatives, must tend to minimize through diversification the overall risk of the

advisors to conclude that a Participant Directed Investment Program must offer, at a minimum, a stock fund, a bond fund and a money market (or similar) fund.”¹⁸⁷ Furthermore, the “volatility rule” within the regulations requires that, at a *minimum*, participants must be allowed to give instructions with respect to their investments no less than once every three months. However, this is merely a *minimum* and some investment alternatives will require more allowable adjustments by plan participants.¹⁸⁸ The most exacting regulations, however, come from the information requirements imposed by the DOL and “[c]omplying with these information requirements proves to be the downfall of many plans.”¹⁸⁹ According to the regulations, a participant who exercises control over his investments can only do so if he is able to obtain the relevant information to make informed investment decisions. Some information must be produced upon request while other information must be produced automatically.¹⁹⁰ The information requirements are numerous, including, but not limited to, an explanation of the plan, description of investment alternatives, identification of managers, description of fees or expenses, information surrounding the assets within the plans, and various voting rights and restrictions.¹⁹¹ Remarkably, these

participant’s investments.

Id.; see 29 C.F.R. § 2550.404c-1(b)(3)(i)(B).

187. Hoecker, *supra* note 183, at Section H-2.

188. *Id.* at Section H-3; 29 C.F.R. § 2550.404c-1(b)(2)(i)(C) (2005).

189. Hoecker, *supra* note 183, at Section H-4.

190. *See id.*

191. The various regulations relating to information disclosure include:

- [1.] An explanation that the plan is intended to constitute an ERISA section 404(c) plan and that plan fiduciaries may be relieved of liability for losses which are the result of participants’ investment instructions.
- [2.] A description of the investment alternatives available under the plan, including a general description of the investment objectives and the risk and return characteristics of each alternative.
- [3.] Identification of any designated investment managers.
- [4.] An explanation of how to give investment instructions, any limits or restrictions on giving instructions and any restrictions on the exercise of voting, tender or similar rights.
- [5.] A description of any transaction fees or expenses which are charged to the participant’s account.
- [6.] Immediately following an investment in an investment alternative subject to the Securities Act of 1933 (such as a mutual fund or other publicly traded investment), a copy of the most recent prospectus, unless the prospectus was furnished immediately before the participant’s investment.
- [7.] Subsequent to an investment, materials provided to the plan relating to the exercise of voting, tender or similar rights, to the extent such rights are passed through to participants.
- [8.] A description of the information available on request and the name, address and phone number of the plan fiduciary responsible for providing that information.

are only the more basic regulations concerning 404(c) plans. For example, when dealing with employer securities, further distinctive requirements must be met,¹⁹² as is also true of various other types of plans.¹⁹³

Enron, which thought it had complied with section 404(c), was sadly mistaken. According to the DOL, Enron never explained that the plan was intended to constitute a plan described in section 404(c) and consequently did not meet the information requirements mandating disclosure.¹⁹⁴ Moreover, the DOL argued that Enron did not demonstrate that it had met any of the specific requirements relating to the investment in employer stock.¹⁹⁵ As a result, the DOL argued that Enron retained “full fiduciary responsibility for all of the plan’s investments.”¹⁹⁶

Although difficult to establish, directors should make an effort to comply with section 404(c) requirements so as to avoid liability for plan losses if they can establish that they adequately fulfilled the statute’s requirements. While the costs of complying with section 404(c) might be high and the regulations somewhat burdensome, the overall benefit would be worthwhile if the directors and company avoid liability for losses to plans, especially if they can make that

As noted above, certain information must be provided only on request. Information which is required to be provided on request includes:

- A description of the annual operating expenses borne by investment alternatives, such as investment management fees.
- Copies of any prospectuses, financial statements and reports and other information furnished to the plan relating to an investment alternative.
- A listing of assets comprising the portfolio of an investment alternative which holds plan assets, the value of such assets and, in the case of such assets which are fixed rate investment contracts issued by a bank, savings and loan association or insurance company, the name of the issuer of the contract, the term of the contract and the rate of return on the contract.
- Information concerning the value of shares or units in investment alternatives available to participants, as well as information concerning the past and current investment performance of the alternative.
- Information concerning the value of shares or units in investment alternatives held in the account of the participant.

Hoecker, *supra* note 183, at Section H-4; *see also* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2); Medill, *supra* note 183, at 525-26 (outlining the information requirements).

192. *See* 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4).

193. *See generally* 29 C.F.R. § 2550.404c-1.

194. Amended Brief of the Secretary of Labor, *supra* note 85, at 35-36.

195. *Id.* at 36.

196. *Id.* at 35-36. Although not explicitly noted by the DOL, there is a good argument that Enron failed to meet several other requirements under section 404(c). *See, e.g.,* Fred Reish & Debra Davis, Reish Luftman, Reicher, & Cohen, *The DOL’s Enron Brief: What It Means for 401(k) Investments* (Apr. 2003), at http://www.reish.com/publications/article_detail.cfm?ARTICLEID=393 (discussing the other requirements under section 404(c) that Enron arguably failed to meet).

claim in a summary judgment motion. In the event that the section 404(c) requirements are not met, the directors have still placed themselves in a better position to avoid liability than if they had not followed the regulations, since the various regulations help ensure that the directors complied with their fiduciary obligations. Furthermore, the regulations provided by the DOL help ensure that plan participants will be protected and that they will receive the necessary information to make informed investment decisions. However, given the difficulties in establishing a section 404(c) defense, directors should not rely solely on its protection. Accordingly, the following recommendations outlined in this Note should be utilized by directors who also believe they qualify under section 404(c).

B. Effectuating Various Other Procedural Safeguards

One of the most important procedures a director should follow to reduce potential liability and to ensure the maintenance of an effective 401(k) plan is to adequately delegate responsibilities for administration of the plan to a competent plan committee.¹⁹⁷ The committee should be "separate, distinct and independent from the board of directors and should not include any overlapping members."¹⁹⁸ As illustrated by the various cases outlined in this Note, breaches of fiduciary duty often arise when there is a conflict of interest, which typically occurs as a result of overlapping roles of the directors as plan administrators or by the directors' direct or indirect control of the administrators' decisions. The cost-effective preventative measure of hiring an independent competent plan committee greatly reduces the impression that they are involved in a conflict of interest with regard to plan investments. The directors, prior to choosing any members to serve on the committee, should fully disclose the ERISA fiduciary duties and obligations attached to the members with regard to their position.

The committee plan should meet between two to four times per year, depending on the size of the plan. They meet to monitor the investment options, to discuss the "relevance of any factor in a fund that could affect its continued suitability" and to decide the "inclusion or elimination of the funds from the lineup."¹⁹⁹ Additionally, the committee should also "address the administrative functions of the plan," but separate committees may be necessary as the plan grows.²⁰⁰ According to Trisha Brambley of *Employee Benefit News*, it is further advisable that the committee be comprised of approximately four to seven senior executives from human resource, finance, and operations, again depending on the

197. See Glenn E. Kakely, Milliman USA, *Employer Stock in a Plan: Is It a Mistake?*, (Dec. 17, 2002), at http://www.milliman.com/pubs/EBCaseStudy17_Employer_Stock.PDF.

198. *Id.*

199. Trisha Brambley, *401(k) Oversight Committees: Foundation for Fiduciary Responsibility*, *EMPLOYEE BENEFIT NEWS*, Oct. 2003, available at <http://www.benefitnews.com/pfiv.cfm?id=5140>.

200. *Id.*

size of the plan.²⁰¹ Brambley also recommends that subcommittees of employees from different divisions within the company be allowed to attend meetings periodically to give employees a “voice regarding the plan,” but should not be given a vote, as those decisions are better left to qualified committee members.²⁰²

Furthermore, the directors should require that committee members implement guidelines for monitoring the performance of the investment options and maintain detailed records of their procedures. As part of the directors’ oversight responsibilities, it is critical that the board have access to all committee meeting minutes and records of activity kept by the committee. The procedures followed by the committee should further be organized into the committee’s plan investment policy—a written statement that addresses the procedures utilized by the committee to determine plan alternatives and investments, particularly if such investments are in company stock.²⁰³ Milliman USA, one of the largest independent actuarial consulting firms in the United States, advises that a written investment policy address eleven specified issues. After the directors have appointed a qualified committee team to administer the 401(k) plan, they need to review the committee’s investment policy to determine whether it adequately addresses the following eleven issues:

- [1.] The plan’s goals and objectives
- [2.] The specific criteria for selecting investment managers, mutual funds and other investments
- [3.] Guidelines as to how funds will be monitored
- [4.] Standards as to what benchmarks will be used for review of investment performance
- [5.] Minimum acceptable investment returns
- [6.] A procedure to follow if a fund fails to meet investment expectations
- [7.] A policy with respect to fund manager changes
- [8.] An annual investment audit procedure
- [9.] Guidelines for the evaluation of plan expenses
- [10.] A policy with respect to participant education
- [11.] A record retention policy to prove compliance.²⁰⁴

In addition to the above issues, other advisors have urged that plan committees specifically identify the types of due diligence fiduciaries should undertake in their selection and monitoring of plan assets and in their record keeping.²⁰⁵ A written plan investment policy that addresses all of these issues will significantly

201. *Id.*

202. *Id.*

203. Kakely, *supra* note 197.

204. *Id.*; see also Reish Luftman Reicher & Cohen, *Testimony Before the ERISA Advisory Council on Behalf of the American Society of Pension Actuaries* (Sept. 19, 2002) [hereinafter *Testimony Before the ERISA Council*], at http://www.reish.com/practice_areas/EmpBenefits/testimony.cfm (listing issues that a written investment policy statement should cover).

205. See *Testimony Before the ERISA Council*, *supra* note 204.

reduce the risk of plan losses, thereby reducing the risk of liability to directors. Additionally, after directors hand over responsibility of plan decisions to a qualified plan committee, the directors are not required to reevaluate the plan committee's decisions. Their duty is to ensure that the committee follows the proper procedures in making those decisions, thus the importance of the written plan investment policy.²⁰⁶

As noted in one of the eleven criteria by Milliman USA, the directors should also require disclosure of certain information to plan participants. The DOL issued an interpretive bulletin explaining how employers can offer investment-related education information to participants, without the information being considered investment advice pursuant to ERISA, after employers expressed liability concerns associated with providing investment information.²⁰⁷ The allowed educational information includes information regarding the plan, general financial and investment information, asset allocation models, and interactive investment materials.²⁰⁸ The Securities and Exchange Commission further advised that employers who divulge information listed within the DOL guidelines would not be subject to registration or regulation under the Advisors Act.²⁰⁹ When plan participants are provided greater information about their plans, the directors' oversight responsibilities are alleviated to some extent because the employees will have a shared responsibility to effectively utilize that information.

C. Obtaining Fiduciary Liability Insurance

Finally, after the directors have established effective procedures to ensure the successful maintenance of a 401(k) plan, they should further protect themselves from personal liability by obtaining fiduciary insurance. Fiduciary liability insurance is intended to cover fiduciaries from claims arising out of an alleged failure to prudently act under the dictates of ERISA.²¹⁰ Such insurance should provide a wide protection to the sponsor employer and its officers, directors and

206. While these are some of the more significant requirements that need to be addressed by the directors, there are other numerous and complex issues the plan committee must work through in establishing a high quality, well-designed 401(k) plan that complies with ERISA regulations. Directors should encourage the committee to consult with outside professionals in creating and maintaining a 401(k) plan that fits the particular needs of their company and its employees. For example, as illustrated above, a company that wishes to meet 404(c) regulations will face highly complex requirements that often can be navigated only with help from specialized advisors.

207. Department of Labor Interpretative Bulletin Relating to Participant Investment Education, 29 C.F.R. § 2509.96-1(d) (2005).

208. *Id.*

209. Interpretive Bulletin 96-1, Participant Investment Education, Final Rule, 61 Fed. Reg. 29586 (June 11, 1996) (to be codified at 29 C.F.R. pt. 2509)

210. INSURECAST, *Fiduciary Liability Insurance*, at http://www.insurecast.com/html/fiduciary_liability_insurance.asp (last visited Apr. 19, 2005).

employees from their liability exposures arising from ERISA.²¹¹ For example, Blais Excess & Surplus Agency of Texas, Inc. ("Blais"), is one of the many insurance companies that offers fiduciary insurance. The Blais insurance program:

Covers past, present and future directors, officers, [and] . . . the plans for actual or alleged wrongful acts. Wrongful act includes a violation of any responsibility, obligation or duty under ERISA Provides payment of defense costs, settlements and judgments for damages for which an insured is legally liable. Also provides coverage for administrative errors and omissions claims. Potential claimants include plan participants, the Department of Labor and other federal agencies.²¹²

There are two other types of coverage related to fiduciary liability insurance.²¹³ The employee benefit liability insurance covers mostly administrative errors.²¹⁴ Coverage will normally include specific errors or omissions with respect to administration of the plan, for example, failing to enroll an employee in the plan or providing improper advice as to benefits. The other type of coverage is fidelity bonds. These bonds are required by law and cover situations involving dishonest administrators or trustees who have financially harmed an employee benefit plan. The bonds can only be used for the benefit of the plan and the plan's beneficiaries, and is not a protection against liability claims.²¹⁵

While fidelity bonds are required under ERISA, fiduciary liability and employee benefit liability insurance are not. Nevertheless, directors should have both types of insurance to ensure that they are adequately protected against liability with regard to their 401(k) plan. There are numerous companies that offer such insurance and many different policy plans for companies to choose from. Therefore, directors should carefully review their company's insurance coverage to determine if they feel comfortable with the protection afforded to them, searching for better alternatives if they believe their current plan is deficient.

However, even with insurance coverage, directors should be every bit as cautious about violating their fiduciary duties, because directors defending ERISA fiduciary claims typically have more at stake than their insurance covers.

211. TENNANT RISK SERVS. INS. AGENCY LLC, *Fiduciary Liability Insurance*, at <http://www.tennant.com/p-fiduciary.html> (last visited Apr. 19, 2005).

212. BLAIS EXCESS & SURPLUS AGENCY OF TEXAS, INC., *Fiduciary Liability Insurance*, at http://www.blaisexcess.com/fili_tables.html (last visited Apr. 19, 2005).

213. INSURECAST, *supra* note 210.

214. The Insure Cast Fiduciary Liability Insurance includes both fiduciary liability and employee benefits liability insurance under one plan. This may or may not be advantageous, and will depend on the particular situation of the insured. *Id.* Thus, it is important for directors to discuss the pros and cons of combining the plans in one policy, because insurers have a tendency to combine the insurance – which may not be the preferable option for the insured. *Id.*

215. *Id.*

For example:

While Enron carried \$85 million in fiduciary liability insurance to cover lawsuits related to benefit plan losses and another \$350 million for directors' and officers' insurance "to protect the company and top officials from liability if they are sued," the availability, as well as the sufficiency, of these and other funds to pay any forthcoming judgment is questionable.²¹⁶

Consequently, although it is important for directors to have fiduciary liability insurance, it is even more important that they establish proper procedures to ensure that plan assets are prudently invested. While complying with section 404(c) regulations is one way for directors to avoid liability, the difficulty in meeting all of the numerous and complex requirements of section 404(c) should discourage directors from relying entirely on the safe harbor provision for protection. Instead, in addition to striving to meet section 404(c) requirements, directors should establish an effective system to properly oversee and review plan investment decisions.

CONCLUSION

Until recently, a company's board of directors may not have paid much attention to their company's 401(k) asset allocation and performance. However, corporate directors are increasingly realizing that their 401(k) plans could become the source of significant personal liability if they do not take proper precautions to prevent plan losses. In light of the upsurge in recent corporate scandals involving 401(k) losses and the height of media attention focused on such scandals, it is likely that courts will interpret ERISA fiduciary duties more broadly, serving as a cautionary tale to directors who participate in the management of these plans, even if their involvement is merely appointment of plan administrators. The *Enron* decision and the DOL's stance in that case both illustrate a trend toward stricter enforcement of ERISA obligations upon corporate directors. As litigation over 401(k) plan losses increases, it is crucial that directors understand their fiduciary obligations under ERISA so that they can initiate necessary procedures to prevent plan losses, thereby avoiding personal liability.

The goal of ERISA is to safeguard employees' retirement funds from corporate mismanagement. In scrutinizing directors' fiduciary obligations with regard to plan assets broadly, the courts are effectuating this goal by forcing

216. Janice Kay Lawrence, *Pension Reform in the Aftermath of Enron: Congress' Failure to Deliver the Promise of Secure Retirement to 401(K) Plan Participants*, 92 KY. L.J. 1, 32 (2003) (quoting, in part, John Keilman, *No Assurance of Enron Insurance Payouts: Some Firms Try to Void Policies*, CHI. TRIB., Feb. 24, 2002, at 1). "[T]ypically, money from both kinds of insurance goes first for defense costs, and Enron has already asked a bankruptcy judge for permission to use \$30 million to pay the legal expenses of current and former officials." *Id.* at 32 n.161 (quoting Keilman, *supra*, at 1); see also Manning, *supra* note 20; *supra* notes 21-23 and accompanying text.

directors to take measures to prevent plan losses. While this is necessary to provide retirement security to American employees, if the courts impose overly burdensome obligations on directors, companies may no longer offer retirement plans because they are too costly. As a result, instead of effectuating the goals of ERISA, the courts may actually cause a decline in retirement security. Thus, the courts should seek a balance that provides the necessary incentives for directors to effectively carry out their obligations as ERISA fiduciaries, while also continuing to provide an incentive for directors to offer 401(k) plans. That balance can be achieved by holding directors liable only for mismanagement of plan assets for which they could have prevented through careful review of plan investment decisions and the procedures followed in reaching those decisions. Only if the directors are on notice of fiduciary violations, or would have been on notice had they been attentive to the actions of the plan committee, should the directors be found liable for plan losses. However, if there does not appear to be any misconduct on the part of the plan committee members in reaching their investment decisions, the directors should not be expected to do their own evaluation or investigation into the prudence of plan investments.

Directors will be personally liable when they fail to meet their ERISA duties of monitoring plan assets by careful review; however directors can avoid liability by putting into place cost-effective preventative measures that ensure that proper procedures are followed with regard to the investment of plan assets. Therefore, directors can avoid liability, continue to offer 401(k) plans, and effectively monitor plans, all of which effectuate the goal of ERISA—to provide retirement security.

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